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REFORMING *HUDUD* ORDINANCES TO RECONCILE ISLAMIC CRIMINAL LAW WITH INTERNATIONAL HUMAN RIGHTS LAW

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DECLARATION

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Reforming *hudud* ordinances to reconcile Islamic criminal law with international human rights law

ABSTRACT

International human rights laws are grossly violated by the *hudud* ordinances, with their extremely cruel punishments, including stoning for adultery, beheading for apostasy, and amputation for theft. Pakistan, Sudan, Brunei Darussalam and Saudi Arabia, for example, follow the doctrines of the four main Sunni schools of jurisprudence and enforce *hudud* ordinances, thereby violating some of the core international human rights law instruments to which they are State Parties. Orthodox Muslims generally defend the *hudud* ordinances, claiming that they are divine and immutable.

This study refutes the aforementioned claim and demonstrates that it is legitimate and possible to reform *hudud* punishments to reconcile them with international human rights law. The thesis differentiates between *Shariah* and Islamic law. It argues that *Shariah* refers to the divine rulings recorded in the Qur'an and correct *Sunnah*, while Islamic law is not fully divine, for it includes also such prescriptions that have been developed by the human effort of Islamic jurists.

The thesis demonstrates that reformation is an Islamic concept that requires that Muslims read the teachings of the Qur'an and the *Sunnah* in the context of their own time and environment. It is postulated, therefore, that the rulings of Islamic law need to be examined in the light of the Qur'an, the correct *Sunnah* and the Islamic core values promoted in them. These include several internationally protected human rights, such as the right to life, equality, and freedom of religion.

The thesis points out that the main purpose of *Shariah* is to serve the benefit of the people and to protect them from harm. To this end, *Shariah* has provided the Islamic principles of reality and necessity. These require that the reality of life and the needs of the people be considered at all times. If necessary for the sake of the people, the principles allow for exceptions to be made to even definite provisions. It, further, demonstrates how these principles can be applied to reform the *hudud* ordinances to reconcile them with international human rights law.

Mark A. Gabriel, 18 August 2016

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DEDICATION

I dedicate this work to my family in Egypt:
my parents, sister and brothers whom I love dearly,
and to all Muslims who are striving to live in peace, liberty and justice.
May this work help to bring forth what your hearts are longing for.

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CHAPTER 1 – INTRODUCTION

I Background of the research

This research deals with Islamic criminal law, particularly the set of crimes and punishments known as *hudud* ordinances,¹ and investigates the complex relationship between them and international human rights laws. Human rights can be considered as one of the most valuable, and yet vulnerable, gifts to humankind. That human rights have been protected by international law and acknowledged by the majority of the world population as a legal basis for their domestic laws, is one of the most remarkable achievements of our time. This research demonstrates that *Shariah's* core values have in fact much common ground with internationally protected human rights. Unfortunately, though, Islamic criminal law, particularly the set of *hudud* ordinances with its extremely harsh and cruel punishments, clashes with both *Shariah's* purposes (*maqased al-Shariah*) and with international human rights in a fundamental and severe way. The punishments foreseen by the *hudud* ordinances include beheading by the sword for leaving Islam, stoning to death for adultery, public flogging for fornication and defamation, amputation of limbs for thievery, and crucifixion, beheading, amputation of limbs, or exile for the crime of *haraba* (fighting against Allah and His Messenger). International human rights laws ban such punishments. The Universal Declaration of Human Rights (UDHR),² the International Covenant on Civil and Political Rights (ICCPR)³ and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)⁴ unanimously declare that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.⁵ *Hudud* punishments, further, violate the principle of equality, which is one of the most fundamental human rights. The UDHR stresses that 'the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that these

¹ The Arabic term '*hudud*' (sing. *hadd*) can be translated as boundary or limit and refers to the boundary that identifies what is prohibited and what is permissible. *Hudud* ordinances are known as a set of crimes that concern the right of Allah and that have specific punishments.

² Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly resolution 271 A (III) of 10 December 1948.

³ International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976.

⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) adopted by the United Nations General Assembly resolution 39/46 of 10 December 1984; entry into force 26 June 1987.

⁵ UDHR art 5; ICCPR art 7; CAT, arts 1 (1) and 16(1).

rights ‘derive from the inherent dignity of the human person’.⁶ Further, *hudud* ordinances violate the religious freedom, protected in art 18 of the UDHR.

Several publicly professed Muslim countries, including Saudi Arabia, Pakistan, Sudan and Brunei Darussalam are members of the United Nations and are among the signatories of the main international human rights treaties or conventions, yet they officially practice *hudud* ordinances as part of their criminal justice system. They compromise their legal responsibility of protecting human rights within their territory by failing to bring their domestic criminal law into line with international human rights laws. Muslim countries that practice Islamic law usually defend the practice of *hudud* ordinances, arguing that they are divinely assigned, and therefore perfect, infallible, mandatory and immutable.⁷ Consequently, amending *hudud* ordinances to ensure consistency with international conventions is not an option to them. This claim is based on a widespread failure to distinguish between *Shariah* and Islamic law. Orthodox Muslims view Islamic law as a God-given system that is superior to any human-made law, including the international laws of human rights.⁸ Human rights organisations and activists who call upon Muslim countries to adjust their national laws and make them compatible with international human rights laws are, therefore, usually viewed by orthodox Muslims as infidels who call on Muslims to court heresy.⁹

Due to the worldwide rise of radical Islamic groups, who strive to implement Islamic law, the threat to human rights through the application of the *hudud* ordinances is steadily increasing. The so-called ‘Arab Spring’ contributed significantly to an increase in the power of radical Islamic groups, including Boko Haram in Nigeria, al-Shabaab in Somalia¹⁰ and the Islamic State in Syria and Iraq (ISIS), all of which practice *hudud* ordinances. The methods used by these radical Muslims groups are extremely inhumane and excessive. The practice of the cruel *hudud* punishments harms the reputation of Islam and Muslims worldwide and causes them to be criticised as barbaric and antiquated. This contributes to the worldwide rise

⁶ UDHR op cit note 2 ‘Preamble’.

⁷ ‘Al-Sudiya tudafe an al-Shariah wa Uqubat al Eadam bemagles huquq al inssan’ *CNN Arabic News* 6 March 2014, available at <http://arabic.cnn.com/middleeast/2014/03/06/saudi-execution-un>, accessed on 11 April 2016; ‘Saudi Arabia: Spike in executions’ *Human Rights Watch* 1 June 2015, available at <https://www.hrw.org/news/2015/06/01/saudi-arabia-spike-executions>, accessed on 11 April 2016.

⁸ Muhammad al-Ghazali *Huquq al-Insan beina Taalim al-Islam wa ‘Elan al-Umam al-Mutahida* (2003) 7; Yusuf al-Qaradawi *Shariat al-Islam Salehah lel Tatbiq fi Kul Zaman wa Makan* 5 ed (1997) 11&17; Abdul Aziz Bin Fawzan al-Fawzan ‘Human rights in Islam’ *Ahl al-Hadith* 19 December 2010, available at <http://www.ahlalheedth.com/vb/showthread.php?t=232211>, accessed on 3 January 2014.

⁹ Wahba al-Zohaily in an exclusive interview on Islamweb, interviewed by Mohammed Nafisa, 4 August 2002, available at <http://articles.islamweb.net/media/index.php?page=article&lang=A&id=20484>, accessed on 10 January 2014; Shahrul Mizan Ismail *The Dilemma of Hudud and International Human Rights: Proposing a Benevolent Mechanism* (2006) 7.

¹⁰ Al-Jazeera ‘Shabab-Mojahed[in]-Somal’, available at <http://www.youtube.com/watch?v=w8lm2LNJ8uk>, accessed on 1 April 2014.

of what is known as Islamophobia. This can be seen, for example, in the statement of Donald Trump, who suggested during his United States presidential election campaign that Muslims should be banned from entering the United States. Since Muslims represent over 20 per cent of the world's population, this is an issue of great importance and worldwide relevance.¹¹ This shows how urgent it is to reform the *hudud* punishments to counter the damage done to the reputation of Muslims and to respond to the practice of *hudud* punishments by radical Islamic groups and by several Muslim countries.

Since the terror attacks of September 11, 2001, the public debates as to whether or not violence is justified by Islam have never ceased or been responded to effectively. Some view Islam as a peaceful religion and claim that 'Islam' means 'peace', yet others see radical Islamic groups such as ISIS as representatives of the true Islam. Whilst the non-Muslim world strives to understand which of the two opposing views is the correct one, even within the Muslim world similar debates take place. The set of *hudud* ordinances, with its harsh and cruel punishments, is often at the heart of such discussions.¹²

In contrast to orthodox Muslims, who defend *hudud* ordinances as being *divine* and immutable, secular Muslims promote the separation of religion and state and call for Islamic law to be disregarded and for *hudud* ordinances to be abolished.¹³ The view of many moderate Muslims who recognises *Shariah* as divine, but strive for more freedom, is becoming more prevalent in the Muslim world. Many of these moderate Muslims are fully loyal to *Shariah*, but at the same time admit that the *hudud* ordinances are in conflict with human rights and that this conflict needs to be dealt with. Among the moderate voices are those of Majid al-Gharbawi,¹⁴ Nasr Hamid Abu Zayd,¹⁵ Gamal al-Banna,¹⁶ Taha Jabir al-Alwani¹⁷, Abdullahi

¹¹ According to the December 2012 Global Religious Landscape report from the Pew Research Center's Forum on Religion & Public Life '[t]here are about 1.6 billion Muslims, or 23% of the world's population, making Islam the second-largest religion.' Pew Research Center – Fact Tank – June 7, 2013, available at <http://www.pewresearch.org/fact-tank/2013/06/07/worlds-muslim-population-more-widespread-than-you-might-think/>, accessed on 14 March 2014.

¹² Mohammad Hashim Kamali 'Punishment in Islamic law: A critique of the hudud Bill of Kelantan, Malaysia' *Arab Law Quarterly* (1998) 13 (3) 203–234.

¹³ Some of the most famous advocates of secularism in the Muslim world are (or have been) Ahmad Lutfi al-Sayyid, Ismail Mazhar, Qasim Amin, Taha Hussein, Abdel-Aziz Fahmi, Michel Aflaq, Suharto, Mustafa Kemal Ataturk, Gamal Abdel Nasser, Fouad Zakaria, Faraj Foda, Shaker al-Nabulsi and Sayed Mahmoud Qimni (Egypt), Michel Aflaq (Iraq), Suharto (Indonesia), Mustafa Kemal Ataturk (Turkey), Shaker al-Nabulsi (Jordan). Faraj Foda *Qable al-Suqut* (1992) 153–4.

Anwar Sadat was known for his slogan: 'No religion in politics and no politics in religion.' See documentary about Anwar Sadat *Al-Jazeera Arabic TV*, available at <http://www.youtube.com/watch?v=oWKkWDRnwW4>, accessed on 4 May 2014.

¹⁴ Majid al-Gharbawi *Ishkaliyat al-Tajdid* (2000).

¹⁵ Nasr Hamid Abu Zayd *Al-Taḥkīr fī Zaman al-Takfīr: Didda al-Jahl wa-al-Zayf wa-al-Khurafah* 2 ed (1994).

¹⁶ Gamal al-Banna *Al-Fiqh al-Jadid* (1999).

¹⁷ Taha Jaber al-Alwani *Nahw al-Tajdid wal Ijtihad* (2006).

An-Na'im and Tariq Ramadan.¹⁸ They suggest that the way to solve the conflict between *hudud* ordinances and human rights is that the *hudud* ordinances should be reformed or not be practiced at all.¹⁹

In the eyes of orthodox Muslims, however, a call to ignore *hudud* ordinances is unacceptable. Moderate and secular Muslims, who promote the protection of human rights, are often accused by orthodox Muslims of taking part in a large-scale western conspiracy against Muslims and Islam.²⁰ This is because the western world continues to be perceived by many orthodox Muslims as an adversary and a colonial power. It is partly for this reason that many orthodox Muslims do not acknowledge the universality of human rights, for they consider them to be an invention of the colonial powers and a weapon in their hands that is used in the struggle against Islam and Muslims.²¹ Human rights activists are often perceived in Muslim countries as opponents of the ruling system. Since human rights activists defend the rights of all people — regardless of their religion or political opinion — they are often believed to seek to change the system and faith.

Orthodox Muslims often defend their position, claiming that Islam has been protecting human rights long before the establishment of the international human rights bodies.²²

Any approach to ignore or freeze *hudud* ordinances is thus not very promising, for in those countries where they are practiced currently, it is very unlikely that such an appeal would ever be considered. Further, it is important to note that, if *hudud* ordinances were simply set aside, committed or radical Muslims can have them re-enforced at any time, as happened, for example, in Egypt. When the Egyptian regime under Jamal Abdul Nasser put an end to the efforts of the Muslim Brotherhood that had been fighting for the implementation of Islamic law during the late 1950s and early 1960s, the matter seemed to have been settled,

¹⁸ Tariq Ramadan *Radical Reform: Islamic Ethics and Liberation* (2009).

¹⁹ Tariq Ramadan 'An international call for moratorium on corporal punishment, stoning and the death penalty in the Islamic World' (2012), available at <http://tariqramadan.com/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/>, accessed on 1 November 2015.

²⁰ Muhammad al-Ghazali 'Al-shari'a wal qaanun al-wad'ay: Al-estamar al-tashariay fi biladina', available at <https://www.nfaes.com/Articliesfiles/cb66049e.doc>, accessed on 20 January 2014.

²¹ When interviewed by Hajar Diab, Mohammad Mujahid, deputy head of the National Center for Middle East Studies, said: 'The West uses human rights as a pretext to implement the scheme of 'Greater Middle East.' The interview was published by *Al-Ahram al-Massai* in Cairo on 20 January 2011, available at <http://digital.ahram.org.eg/articles.aspx?Serial=416340&eid=1226>, accessed on 2 April 2014.

Abdul Hussein Shaaban, the well-known human rights advocate in Iraq said: 'Human Rights are American weapons' viz Abdul Hussein Shaaban 'Huquq al-Insan Silah Amriki' *Libya-al-Mostakbal* 14 April 2013, available at <http://www.libya-al-mostakbal.org/news/clicked/33165>, accessed on 2 April 2014.

Abdul Hafiz Abdul Rahim Mahbub *Huquq al-Insan fi Zel al-Nizam al-Alami al-Jadid* (2004) available at <http://uqu.edu.sa/page/ar/85694>, accessed on 2 April 2014.

²² Abdulaziz Bin Abdullah al-Khudairi 'Human rights between Shari'a and the international human rights conventions' 7308 (2013) *Al-Eqtasadia*, available at <http://www.aleqt.com/>, accessed on 5 February 2014.

and the enforcement of Islamic law was no longer an issue – at least for a long time. About half a century later, however, after the Arab Spring, when the Muslim Brotherhood came to power with Muhammed Mursi as the new Egyptian president, Islamic law was about to be re-implemented. Even though the new government under Mursi did not last for long, since it was overthrown in a military coup, the rise of committed and radical Muslims in Egypt and the neighbouring countries continued. It was only shortly after the defeat of conservative Muslims in Egypt that the world witnessed the rise of the radical Sunni group known as ‘Daaesh’ or the ‘Islamic State of Iraq and Syria’ (ISIS). ISIS declared the re-establishment of the Islamic caliphate and immediately started applying Islamic criminal law and *hudud* ordinances. Within the first 24 hours after the declaration of its establishment, the world news announced that two women had been sentenced to the death penalty by stoning.²³ After having occupied Mosul, Iraq’s second largest city, ISIS called upon the Iraqi Christian community in that city to convert to Islam, pay *jizya* or face ‘death by the sword’.²⁴ Remarkably, ISIS, which claims to practise Islam at its best, caused *hudud* ordinances to appear as the centrepiece of Islamic law. This can explain why many moderate and secular Muslims hesitate to apply Islamic criminal law.

The situation in the Middle East as described shows that the approach of putting *hudud* punishments under a moratorium does not necessarily solve the problem in the long term. In this thesis it is argued, therefore, that in order to end the violation of human rights by *hudud* ordinances, it is necessary to bring a real reconciliation of Islamic criminal law with international human rights standards through a reformation of the *hudud* punishments. Since *Shariah* itself can be seen as promoting human rights, a focus on Islamic core values can help to reconcile the conflict of *hudud* ordinances with international human rights law.

²³ Johnlee Varghese ‘Two women stoned to death for adultery by ISIS in Syria’ *International Business Times, India Edition* 20 July 2014, available at <http://ibtimes.co.in/two-women-stoned-death-adultery-syria-by-isis-604894>, accessed on 20 July 2014.

‘ISIS stoned second woman in 24 hours’ *Al-Madina* 20 July 2014, available at <http://www.al-madina.com/node/546089/> “□ □ □ □”- □ □ □ □- □ □ □ □- □ □ □ □ □ □ □ □ □ □-24-□ □ □ □ .html, accessed on 20 July 2014.

²⁴ Hamdi Alkhshali and Joshua Berlinger ‘Facing fines, conversion or death: Christian families flee Mosul’ *CNN* 20 July 2014, available at http://edition.cnn.com/2014/07/19/world/meast/christians-flee-mosul-iraq/index.html?hpt=imi_c2, accessed on 20 July 2014.

II Research question and description of the problem

The crucial question of this research is whether it is possible and legitimate to reform *hudud* punishments so that Islamic criminal law can be reconciled with internationally recognised human rights, and if so, how this can be achieved.

Hudud ordinances violate the internationally protected *human* rights in several ways and their enforcement harms the image and reputation of Islam and Muslims in the eyes of the world. Orthodox Muslims, however, firmly reject any attempt to reform them, since they believe that *hudud* ordinances are divinely assigned and thus divine, infallible, mandatory and immutable and that they concern the right of Allah. Consequently it is believed that they cannot be questioned, amended, or forgiven. Efforts to reform them are, therefore viewed as an act of heresy and an assault on Allah's rights and Islamic identity.²⁵ Further, orthodox Muslims defend the harsh *hudud* punishments by declaring that their main purpose is deterrence.²⁶

The main challenge to a possible reformation of *hudud* punishments is constituted by those punishments that have indeed been assigned in the Qur'an. These include the punishment for theft (to 'cut the hand'),²⁷ and the punishment for the crime of *haraba* that is 'execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land'.²⁸ Since these punishments are mentioned explicitly in the Qur'an, they form part of what is known as definite provisions. They are, consequently, considered to be immutable.

The other *hudud* prescriptions that have no legal basis in the Qur'an or correct²⁹ *Sunnah*, but have been developed by Islamic jurists, such as the stoning for adultery, or execution for apostasy, are, nevertheless, considered to be part of the set of *hudud* ordinances, and are consequently claimed to be divine and immutable, even though they are based in the main on weak *ahadith* and on the jurists' human interpretations and opinions.

²⁵ Al-Zoheily op cit note 9.

²⁶ Jamal Bader al-Dawlah 'Mafhum al-uqubah fi al-fikr al-qanuni al-Islami al-Muqaran' 19 November 2011, available at [https://drsabrikhalil.wordpress.com/2011/11/19/□□□□ □- □□ □□□□□-□□ □□ □□ □□□□ □□ □□ □□ □□_2](https://drsabrikhalil.wordpress.com/2011/11/19/□□□□ □- □□ □□□□□-□□ □□ □□□□ □□ □□ □□ □□_2) accessed on 1 February 2016.

²⁷ Surah 5:38.

²⁸ Surah 5:33.

²⁹ 'Correct' *Sunnah* refers to the Arabic term *sahih*. Correct *Sunnah* or correct *ahadith* refers to the collection of *ahadith* that have been widely accepted to be 'correct' in contrast to those that are considered to be weak or false. Such acceptance depends mainly on the reliability of narrators, respectively the chain of (oral) transmission (*isnad*) from its source until it was written down, and whether or not the text (*matn*) is compatible with the teaching of the Qur'an.

It is shown that one of the reasons behind several of the *hudud* prescriptions that conflict with human rights and with the core values of *Shariah* is a reading of the famous concept of the five indispensables (religion, life, intellect, offspring and property) that wrongly elevates the protection of religion above the protection of individuals' rights.

III Limitation of the research

The suggestions for reforming the *hudud* ordinances developed in this thesis focus mainly on the punishments – rather than on the crimes – since the bulk of human rights violations result from the nature of the punishments meted out, and the methods used to execute them. Since the crimes of *hudud* ordinances are mentioned in the Qur'an as violations of Allah's orders, calling for their legalisation will be a great challenge. As for the punishments, by contrast, there are many reasons why they need to be reformed and justifications to do so.

The thesis, further, focuses on the perspective of Islamic jurisprudence and is thus limited to the Islamic internal dimension. The study does not include the question of the practical implementation of the presented suggestions for reform. It is very likely that the presented suggestions will be challenged by both the Muslim community as well as by the governments of Muslim countries. One of the major challenges for the promotion of human rights in Muslim countries is presented by the lack of integrity of some of the main promoters of international human rights,³⁰ including the United States of America³¹ and some European countries, who seem to apply a double standard when it comes to defending international human rights.³² More sincerity in the international discourse would, therefore, be desirable.

Approaches to promote the implementation of the suggested reformation need to be discussed separately in a further research project. An open dialogue among the Muslim communities is one of the key factors required to reach acceptance for the suggestions

³⁰ A case of hypocrisy and corruption can be seen even with the United Nations as the main key player of human rights protection. For the sake of not losing the financial support of Saudi Arabia to the United Nations, Saudi Arabia was deleted from the United Nations' blacklist of countries that are violating human rights. Tyler Durden 'UN admits extortion behind removal of Saudi Arabia from child-killer blacklist' *Zero Hedge* 10 June 2016.

³¹ The United States of America, for example, still practices the death penalty in several of its states even though International human rights laws promote the complete abolition of the death penalty, and they have tortured war prisoners in the detention camp in Guantanamo Bay in Cuba and the Abu Ghraib prison in Iraq, thus violating the ban on torture enshrined in international human rights laws.

³² Western countries seem to compromise the protection of human rights if this benefits their national interest. Their foreign policy shows that they have the tendency to turn a blind eye to the human rights violations of countries with which they have friendly diplomatic relations that they do not want to put at risk. Rudolph Peters *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2006) 182.

developed in this thesis, as is the creation of a public opinion that is in favour of a reform of *hudud* punishments. The purpose of this thesis is to open such a dialogue among the Muslim population by breaking the taboo that bans any discussion of *hudud* ordinances. This thesis provides the necessary information and arguments to stimulate the internal discourse on the topic.

IV Main argument

It is argued in this thesis that it is legitimate, necessary and possible to reform *hudud* punishments and to bring them in line with international human rights laws.

The claim that *hudud* punishments cannot be negotiated since they are divinely assigned and thus perfect and infallible is refuted in this thesis on several grounds. One of them is that several of the *hudud* prescriptions have no legal basis in the Qur'an. They have been developed by Islamic jurists — either without a legal basis in the *Sunnah* or with a weak one. Some of them even contradict the Qur'an.

It is argued that it is the failure to distinguish between *Shariah* and Islamic law that is mainly responsible for the claim that the *hudud* punishments are immutable. The thesis clarifies the difference between *Shariah* as referring to the divinely assigned rules and prescriptions recorded in the Qur'an and the correct *Sunnah* and Islamic law as including additionally the rulings developed by the Islamic jurists. Since these are based on human interpretations and opinions, they are not divine or infallible. It is argued that they can therefore be questioned and can require re-interpretation.

The notion that *hudud* ordinances refer to a fixed set of a specific number of crimes and their punishments is refuted on two grounds. It is stressed that the notion of this set cannot be found in the Qur'an or the correct *Sunnah*. Besides, it does not match the list of crimes mentioned in the *Sunnah* as 'the seven most destructive sins'.³³ Further, there is not even full agreement among the different schools of jurisprudence as to the exact number of crimes to be listed as *hudud* crimes.

Another argument refuted in this thesis is the claim that *hudud* punishments concern the right of Allah and can therefore not be questioned, amended or forgiven by anyone other than Allah himself. It is argued that this claim is based on the false presumption that the term

³³ The seven 'worst sins' listed in the *hadith* are: 'Associating others with Allah (*Shirk*); witchcraft; killing a soul whom Allah has forbidden us to kill, except for a right that is due; consuming orphans' wealth; consuming *Ribâ*; fleeing from the battlefield; and slandering chaste, innocent women.' *Sahih Muslim* (2007) vol 1 at 177 *hadith* 262.

hudud refers to punishment. It is demonstrated that the term *hudud* refers to the crime, or the boundary identifying what is prohibited and what is permissible. The notion of the right of Allah does therefore not hinder the amendment of *hudud* punishments.

The thesis, further, demonstrates that reformation is not an assault on Allah or Islamic identity, for it is, in fact, an Islamic concept deeply rooted in the Qur'an and the correct *Sunnah*. One of the key texts concerning reformation is the famous Farewell Sermon of the Prophet Muhammad.³⁴ In it the Prophet urges Muslims to abide by the teachings of the Qur'an and the *Sunnah*, and by the core values promoted in them. It is argued that the Sermon can be understood as a call on Muslims of all generations to apply and adjust the teachings of the Qur'an and the *Sunnah* in a way to fit with their own time and environment, thus to do *ijtihad*.

The study points out that the Islamic core values that are stressed in the Farewell Sermon and protected in the Qur'an and the *Sunnah* have much in common with internationally protected human rights. They include the protection of life and property, justice, equality, and freedom of religion. The thesis, therefore, advocates a re-reading of the concept of the five indispensables in a way that reflects the qur'anic promotion of freedom of religion and *Shariah's* purpose to serve the benefit of the people.

The thesis demonstrates that *Shariah* — known to be flexible enough to suit all times and environments — is flexible enough to reform *hudud* punishments. This is thanks to the Islamic principles of reality and necessity (*fiqh al-waqa and fiqh al-darurah*), the principle of doubt and the method of *ijtihad*. It is argued that those prescriptions that have been assigned explicitly in the Qur'an, such as the public flogging for adultery or 'cutting the hand(s)' for theft, can be reformed by applying the Islamic principles of reality and necessity. These principles make it possible to consider the realities of life and the needs of the people. They allow for exceptions to be made, even in respect of definite provisions, if these are necessary to secure the benefit of the people or to protect them from harm.

Those prescriptions that have been developed by Islamic jurists in the application of the method of *ijtihad* can be reformed by re-interpreting the primary sources of Islam by applying the same method, ie *ijtihad*. It is argued, further, that those prescriptions that have no legal basis in the Qur'an or correct *Sunnah* and that contradict *Shariah*, such as the punishment of

³⁴ 'The Last Sermon (Khutbah) of Prophet Muhammad (Farewell Sermon)' (English translation of the sermon) available at <http://www.iqrasense.com/about-islam/the-last-sermon-khutbah-of-prophet-muhammad-farewell-sermon.html>, accessed on 11 August 2016.

The longest and perhaps most complete version of this sermon is given by Imam Ahmed bin Hanbal in his *Musnad*, *hadith* 19774; other parts and versions can be found in *Sahih al-Bukhari*, *hadith* 1623, 1626 & 6361; *Sahih Muslim*, *hadith* 98; *Sunan at-Tirmidh*, *hadith* 1628, 2046 & 2085; See also *Sahih al-Bukhari* (1997) vol 2 at 450 no 1739. Another English translation is available at <http://www.cyberistan.org/islamic/sermon.html>, accessed on 12 September 2014.

execution for apostasy and the stoning for adultery, should be eliminated completely, for the Islamic principle of doubt calls for the suspension of *hadd* punishments if there is any doubt that justifies its suspension.

It is demonstrated, thus, that it is possible to develop — in a religiously and culturally sensitive manner — suggestions for a reform of *hudud* punishments that are compatible with international human rights laws and that are in full compliance with *Shariah* and serve the fulfilment of its purpose by securing the benefit of the Muslim community. It is argued that a reformation according to the suggestions proposed in this thesis can do much to protect the human rights of the people in those Muslim countries, where *hudud* ordinances are currently practiced and it can help repair the damage done to the reputation of Muslims worldwide.

V Significance and contribution of the study

The unique contribution of this research is that it reconciles *hudud* punishments with international human rights laws in a religiously and culturally sensitive manner. It offers suggestions for a reformation of *hudud* ordinances that are in full compliance with *Shariah*. The suggestions for reformation developed in this thesis consider the realities of life of the Muslim society in the twenty-first century, including the internationally recognised human rights standards, and at the same time preserve the Islamic scholarly rules and standards.

In so doing, a bridge is built between the two extreme positions, namely that of secular Muslims, who call for the *hudud* ordinances to be ignored or for a moratorium to be placed on them, and that of orthodox Muslims, who put *hudud* ordinances above international human rights. The aim of this thesis is to bridge the gap between Muslim countries that still apply *hudud* ordinances and, in doing so, violate international human rights laws, and those that care about the protection of human rights and, consequently, reject *hudud* punishments.

The suggested reform of the *hudud* punishments will be of assistance to the Muslim countries where they are currently applied, and also to those where they are currently not practised, but where radical Muslims might gain more influence in the future. In contrast to the appeal to freeze or abolish *hudud* ordinances pronounced by several secular and moderate Muslim scholars, the suggestions for reformation proposed in this thesis provide a long-term solution for the conflict between *hudud* ordinances and international human rights laws.

Another major contribution of the thesis to the topic under discussion is that it clarifies the distinction between *Shariah* and Islamic law and lays out that it is mostly Islamic law, its rules and regulations — especially the *hudud* prescriptions developed by Islamic

jurisprudence — that are responsible for the conflict with human rights and that result in Islam and Muslims being rejected as being a major threat to world peace, justice and security. The Qur'an and the correct *Sunnah*, conversely, actually promote values that are comparable with human rights. Consequently, it is not necessary for a good and committed Muslim to follow blindly all the antiquated and inhumane rules and prescriptions that have been developed by Islamic jurists over the centuries and that have become part of Islamic law. The thesis demonstrates that *Shariah* itself encourages Muslims of all generations to apply the teachings of the Quran and *Sunnah* in a way to fit with their own time and environment. This includes that they might have to re-interpret the primary sources or to clear the Islamic law from the humanly developed rulings that no longer fit with the reality of contemporary life, or that contradict the primary sources of *Shariah*, its core values or main purpose. *Shariah* explicitly declares that its main purpose is to be of benefit to the people and to protect them from harm. *Shariah* allows and requires that the reality of life and the needs of the people be considered, and it provides the necessary tools that allow for this. These allow for exceptions even from divinely assigned prescriptions, and from what is generally prohibited, if this is necessary for the benefit of the people and to prevent them from harm. The clarification of these difference, thus, can help to restore the image and reputation of Muslims in the world and it can help and encourage contemporary Muslims to search for ways to reconcile also other areas of Islamic law with international human rights standards, while remaining faithful to *Shariah*.

VI Methodology

This research follows a comparative approach, comparing the *hudud* ordinances with international human rights laws in order to identify areas of conflict between them. From the perspective of international human rights laws, the main international human rights conventions and treaties (as listed under Sources) are considered, giving special attention to the articles promoting dignity, equality, physical integrity, freedom of opinion and expression and freedom of religion, and banning all forms of cruel and inhuman punishments. From the perspective of Islamic criminal law, the primary sources of *Shariah*, namely, the Qur'an and *Sunnah*, are considered, as are the writings of the different Islamic schools of jurisprudence.

A hermeneutical and analytical approach is used to examine the meaning of the term '*hudud*' (sing. *hadd*), as presented by the Qur'an and *Sunnah*, and a comparative approach is used to contrast it with the use of the term employed by Islamic jurisprudence and

contemporary scholars. An analytical and comparative approach is also used to compare the traditional definitions of the individual *hadd* crimes and punishments with the ones found in the Qur'an and *Sunnah* for the purpose of analysing their legal justification and evaluating whether they can be considered divinely assigned or rather developed by human effort. In addition, the definitions and interpretations pertinent to *hudud* ordinances according to the four main Sunni schools of jurisprudence, the Hanafi, Maliki, Shafei and Hanbali schools, are compared.³⁵

The thesis, further, contains an analysis of the practical application of *hudud* ordinances in Muslim countries, giving special attention to Saudi Arabia, Pakistan, Sudan and Brunei Darussalam as representative countries of the four Sunni schools of jurisprudence.

An analytical approach is applied to investigate the concept of reformation in Islam. This analysis is used to demonstrate that Islam promotes reformation by applying the concept of *ijtihad* (independent reasoning).³⁶ Special emphasis is placed on the Islamic *legislation of necessity* (*fiqh al-darurah*) and the *legislation of reality* (*fiqh al-waqa*).³⁷

Further, the wide-ranging views relating to *hudud* ordinances and human rights are analysed by considering the different views and positions across the Islamic world — from orthodox to moderate and secular Muslims. Special attention is given to already established approaches aiming to solve the conflict between Islamic criminal law and human rights.

Finally, it is proposed that the *hudud* punishments can be reformed in a way that the conflict between Islamic criminal law and international human rights law can be reconciled. Suggestions for such a reform of *hudud* punishments are developed in application of the Islamic legislation of necessity and of reality are applied.

VII Sources

The study is based on primary and secondary sources of Islamic criminal law and international human rights law. The Qur'an and *Sunnah* — as the primary sources of Islamic

³⁵ The study focusses on the four main schools of Sunni schools of thought since it is the Sunni tradition that represents the very majority of Muslims worldwide. Further, it is the Sunni Muslims who play a key role in the contemporary world, since they have a major influence on world politics, on international relations, on war and peace and on the violation of human rights.

³⁶ Yusuf al-Qaradawi *Al-Ijtihad fi al-Shariah al-Islamiyah* (1996) 84.

In the *hadith* the principle of *ijtihad* was presented by the Prophet's companion Mu'az, who was sent to Yemen. Answering the Prophet's question as to what he would do if he were to rule in a legal dispute, Mu'az explained that his rule would depend upon what is written in the word of Allah, and if he would not find the answer in the book of Allah or the *Sunnah* he would use *ijtihad*. Ibn al-Qayyim al-Jawziyyah *I'lam al-Muwaqqain an Rabb al-Aalamin* (1991) vol 1 at 155.

³⁷ Al-Alwani op cit note 17 at 52.

law — are examined with a special focus on the provisions that are relevant to the *hudud* ordinances. If not otherwise noted, quotations from the Qur'an are taken from the translation of Yusuf Ali, since it is one of the most popular ones. Further, the thesis draws from qur'anic commentaries, including Ibn Kathir, *Tafsir Sufiyan al-Thawir*³⁸ and *Tafsir al-Tabari*³⁹ Concerning the *Sunnah*, particular focus is placed on the set of the six correct books of *ahadith*, ie *Sahih Bukhari*, *Sahih Muslim*, *Sunan al-Tirmidhi*, *Sunan Abu Dawud*, *Sunan Ibn Majah*, and *Sunan al-Nasa'i*.

When discussing *hudud* ordinances according to the four Sunni schools of jurisprudence, the thesis considers the writings of well recognised early scholars. The Hanafi scholars include Muhammad bin Framuz al-Hanafi (*Al-Durar al-Hikam fi Gurar al-Ahkam*), Mahmud Bin Ahmad al-Aini (*Al-Binayah fi Sharh al-Hidayah*), Umar Bin Ibrahim Ibn Najm (*Al-Naher al-Faeq fi Sharh Kenz al-Daqaeq*) and Ibn Mazah al-Bukhari (*Al-Muheat al-Burhani le-Masael al-Mabsut*). The Hanbali scholars include Ahmed Bin Abdul-Halim Ibn Taymiyyah (*Al-Saarim al-Maslul ala Shatim al-Rasul*), Abdul Ghani al-Nabulsi (*Hashiat al-Libdi ala na'il al-Maareb fi al-Fiqh al-Hanbali*), Majd al-Din Abi al-Barakat (*Al-Muharrar fi al-Fiqh al-Hanbali*), Ibn Qudamah al-Maqdisi (*Umdat al-Fiqh fi al-Mazhab al-Hanbali*), Ali Bin Suleman al-Merdawi (*Al-Ensaf fi Marefat al-Rajah min al-Kilaf*) and Ibn Qayyim al-Jawziyyah (*I'lam al-Muwaqqi'in*). The Maliki scholars include Kalil Ibn Ishaq al-Mi (*Muktassar Kalil fi Fiqh al-Imam*), Ahmad Ibn Idris al-Qarafi (*Al-Zakerah*), Abdulalah Bin al-Jalab al-Basri (*Al-Tafriyah*), Bahram al-Dumeri (*Al-Shamel fi Fiqh al-Imam Malik*), and al-Qadi Abdulwahab al-Bagdadi (*Al-Maaunah ala Mazhab al-Imam*). The Shafei scholars include Muhammad Bin Idris al-Shafei (*Al-Um*), Ismael al-Masri al-Mazni (*Muktasar al-Mazni fi Ferua al-Shafeiyah*), and Yahya Ibn Sharaf al-Nawawi (*Minhaj al-Talibin*).

Also referred to are the writings of contemporary scholars, such as, Sayed Sabeq (*Fiqh al-Sunnah*), Abdul Rahman al-Jaziri (*Al-Fiqh ala al-Mazaheb al-Arbaa*), Abdul Qadir Audah (*Al-Tashariat al-Jinai al-Islami Muqaranan bil Qanun al-Wadai*), Salih Bin al-Fawzan (*Mulachas al-Fiqh al-Islami*), and Mohammed al-Zoheily (*Al-Muatamad fi al-Fiqh al-Shafi'i*).

The research does not rely on the writings of Orientalist scholars, such as Joseph Schacht or Noel J. Coulson, because these writers are considered by orthodox Muslims as the intellectual wing of the Western crusaders' who aim to discredit Islam.

³⁸ Al-Thawri, Sufyan *Tafsir Sufyan al-Thawri* (1983).

³⁹ Muhammed Ibn Jarir *Jami al-Bayan Al-Tabari fi Ta'wil ay al-Qur'an (Tafsir al-Tabari)* (1997).

In the discussion of the definitions of *Shariah*, *fiqh* and *hudud*, the writings of different orthodox and moderate authors are referred to, including those of Abd al-Rahman al-Jaziri,⁴⁰ Shukri al-Daqaq and Abdul Fattah,⁴¹ Masfar bin Ali al-Kahtani,⁴² Raghib al-Sirjany,⁴³ Gamal al-Banna,⁴⁴ Tariq Ramadan⁴⁵ and Taha Jabir al-Alwani.⁴⁶

When looking at the different Muslim positions toward *hudud* ordinances the writings of orthodox, moderate and secular scholars are considered in this study. The orthodox position is represented by scholars, including Saleh al-Otaibi,⁴⁷ Imad Ali Gomaa,⁴⁸ Ibn Othaimeen⁴⁹ and Abdul Wahab.⁵⁰ The moderate scholars include Majid al-Gharbawi,⁵¹ Gamal al-Banna,⁵² Abdullahi Ahmed An-Na'im,⁵³ Tariq Ramadan⁵⁴ and Marwan Ibrahim Qaisi.⁵⁵ The arguments of secular Muslims include those of al-Sadiq al-Nayhum,⁵⁶ Khalil Abdul Karim⁵⁷ and Fouad Zakaria.⁵⁸ The study considers authors, such as Mahmoud al-Zeyni⁵⁹ and Muhammad Nasr al-Din al-Albani, when discussing the Islamic legislation of reality (*fiqh al-waqa*) and the legislation of necessity (*fiqh al-darurah*).⁶⁰ When examining the primary and secondary sources of Islamic law, books, articles and research papers relating to *Shariah* in general and

⁴⁰ Abdul Rahman al-Jaziri *Al-Fiqh ala al-Mazaheb al-Arbaa* 2 ed (2003).

⁴¹ Shukri al-Daqaq and Mahmoud Samir Abdul Fattah *Al-Ahkam al-Asasiyah li-al-Shari'a al-Islamiyah* (2002).

⁴² Masfar Bin Ali al-Kahtani 'Al-istid'lal be maqased al-Shari'a fi al-nawazel al-mustajadda' (research paper presented to the International Scientific Conference at Yarmouk University and the International Islamic University of Science Amman, Jordan, 22-23 December 2013).

⁴³ Raghib al-Sirjany 'Al-hudud fi al-Islam' 14 December 2011, available at <http://islamstory.com>, accessed on 20 January 2014.

⁴⁴ Al-Banna op cit note 17.

⁴⁵ Ramadan op cit note 18.

⁴⁶ Al-Alwani op cit note 17.

⁴⁷ Saleh Bin Ali al-Otaibi *Al-Elan an al-Hudud al-Sharaiyah wa Atharohu fi al-Radeh al-Aam* (2000).

⁴⁸ Imad Ali Jumah *Al-Mulakhasat al-Fiqhiyyah al-Mujazara* 2 ed (2003).

⁴⁹ Ibn Othaimeen *Fatawa Ibn Othaimeen*, available at <https://www.ibnothaimeen.com/noor.shtml>, accessed on 19 January 2014.

⁵⁰ Muhammad Abdul Wahab *Al-Durar al-Sunniyah* (1991) 10.

⁵¹ Al-Gharbawi op cit note 14.

⁵² Al-Banna op cit note 16; Gamal al-Banna *Tajrid al-Bukhari wa Muslim min al-Ahadith al-Latti le-Tulzim* (1997); Gamal al-Banna *Jenayat Qabilat Hadathana* (2008).

⁵³ Abdullahi Ahmed An-Na'im *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990).

⁵⁴ Tariq Ramadan 'Stop in the name of humanity' (2005) *Globe and Mail*, London, available at <http://www.theglobeandmail.com/globe-debate/stop-in-the-name-of-humanity/article735465/>, accessed on 10 August 2015.

⁵⁵ Marwan Ibrahim al-Qaisi *Human Rights in Islam* (2005), available at <http://arablib.com/harf?view=book&lid=3&rand1=WU1rOVA1JnJmajNz&rand2=aEk5YTA3UihQJTg0>, accessed on 1 June 2016.

⁵⁶ Al-Sadiq al-Nayhum *Islam didd-Islam* (2000).

⁵⁷ Abdulkarim Khalil *Al-Gesur al-Tarikia lel Shari'a al-Islamiya – Nahw Fiqhr Islamiy Jadid* (2004).

⁵⁸ Fouad Zakaria *Al-Haqiqah wal Wahm fi al-Harakah al-Islamiyah al-Muaserah* (1986).

⁵⁹ Mahmoud al-Zeyni *Al-Darura fi al-Shari'a al-Islamiyah wa Tatbiqaa'tiha: Dirasa Murqarana* (1993).

⁶⁰ Muhammad Nasr al-Din al-Albani *So'al wa Jawab hawl Fiqh al-Waka* 2 ed (2001).

the *hudud* ordinances in particular are relied on to determine the different interpretations presented by the Islamic jurists of the Sunni tradition.

The primary sources of international human rights law considered in this thesis include the Universal Declaration of Human Rights (UDHR), the UN Convention against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Reference is also made to secondary sources such as books, articles and research papers in both English and Arabic that discuss international human rights law in general, and the relationship between Islamic law and human rights in particular.

VIII Structure of the thesis

Chapter 2 is introductory in nature. It lays the foundation of the research by a presentation of the relevant definitions pertinent to Islamic criminal law and the *hudud* ordinances. It describes the primary and subsidiary sources of *Shariah*, explains the role of Islamic jurisprudence (*fiqh*) and describes the difference between *Shariah* and Islamic law.⁶¹ It explores the meaning of the term *hudud* (sing. *hadd*) and points out the contradictions between the prescriptions given by *Shariah* and those developed by Islamic jurisprudence. In doing so, the chapter refutes the claim that *hudud* ordinances are a fixed set of entirely divine — and thus infallible and non-negotiable — prescriptions. The chapter demonstrates that it is legitimate and necessary to reconsider and re-interpret the prescriptions regarding *hudud* ordinances, since they do not correctly reflect the prescriptions of the primary sources of *Shariah*, namely the Qur'an and the *Sunnah*. It is with this in mind that the chapter draws the distinction between what can be considered as 'divine elements' and those that cannot be considered divine, since they are based on human opinion and understanding, and that can consequently be questioned. This will be the basis for the main part of the thesis, namely to question and re-interpret the elements that are in conflict with principles of human rights.

In Chapter 3 the twofold nature of the research controversy is identified. This is, in the first instance, the human rights violations caused by *hudud* ordinances, and in the second, Islamic reservations that make Muslim countries reluctant to make their national criminal law compatible with international human rights laws. One of the main obstacles is a deep distrust

⁶¹ Ahmed Berwal 'Al-farq beina al-Shariah wal fiqh wal qanun' (2007), available at <http://www.startimes.com/f.aspx?t=6655790>, accessed on 14 April 2014.

of Muslims for the west in general. It is for this reason that orthodox Muslims usually reject international human rights laws as a western invention and deny their universality. At the same time, they claim that human rights were observed by Islam well before the international human rights bodies were established.⁶² In doing so, they point to the Islamic concept of the five indispensables that protects religion, life, intellect, offspring and property.⁶³ It is argued that there is enough common ground between the Islamic and the international understanding of human rights to support the notion of their universality. The chapter also discusses the different positions held by orthodox, moderate and secular Muslims in respect of *hudud* ordinances and human rights.

Chapter 4 discusses the *hudud* ordinances according to the four main Sunni schools of jurisprudence, namely the Hanafi, Maliki, Shafei and Hanbali schools.⁶⁴ The first part of the chapter, which is introductory in nature, gives an overview of the development and the geographical distribution of the four Sunni schools. It also looks at the practical application of *hudud* ordinances in four representative Muslim countries that apply *hudud* ordinances fully countrywide, namely Saudi Arabia (Hanbali school of jurisprudence), Pakistan (Hanafi school), Sudan (Maliki school) and Brunei Darussalam (this has just started implementing *hudud* ordinances according to the Shafei school of jurisprudence). The focus will be on their national criminal law and international concerns regarding human rights violations in these countries.

The second, and main, part of the chapter discusses the legal prescriptions of *hudud* ordinances according to the four Sunni schools and investigates the different opinions and regulations concerning each crime's definition — and the punishment and legal requirements needed for a suspect to be convicted. It begins by giving an overview of the differing numbers of *hudud* crimes held by the four Sunni schools and explains the main reasons that led to the differing views.

The argument presented in the chapter is that there are great differences and contradictions in the views and opinions held by the four schools, and that the notion of a divinely assigned and thus perfect and infallible fixed set of *hudud* ordinances can therefore

⁶² Mohammed Salam Madkoar 'Human rights from an Islamic worldview: An outline of Hudud, Ta'zir & Qisas', available at http://www.islamawareness.net/Shariah/sh_article002.html, accessed on 2 February 2014; Al-Khudairi op cit note 22.

⁶³ This very well-known principle was originally developed by Imam Abi Hamid al-Ghazali. Thereafter Imam Shatibi, who wrote the most famous book on this topic (*Makased al-Shariah*), included honour as one of the five indispensables, while Sheikh Muhammad Rashid Rida later considered that as many as ten different categories were relevant. This concept will be discussed in more depth in Chapter 5.

⁶⁴ Whilst all four schools agree on the basic fundamental teachings, differences concerning secondary issues can be found.

hardly be maintained. The weaknesses and contradictions of the *hudud* prescriptions exposed in this chapter demonstrate the necessity to amend and reform them.

Chapter 5 discusses the Islamic concept of reformation and demonstrates that this is deeply rooted in both the Qur'an and the *Sunnah*. The Quran introduces reformation as a call to Muslims to renew their faith and restore the religion to its genuine condition as designed by its creator in the first place. This includes a return to the core values of Islam that include justice, and equality, peace and harmony, forgiveness and mercy and the protection of life and property.

The chapter introduces religious texts of the Qur'an and *Sunnah* pertinent to the topic of reformation. One of these is Allah's promise to send reformers on a regular basis to renew the religion. A particular focus is on the famous Farewell Sermon of the Prophet that is a key text pertinent to reformation. In this sermon the Prophet urges his followers to keep and protect the afore-mentioned core values of Islam and he declares the Qur'an and the *Sunnah* to be the ultimate guidelines for Muslims. He points out that Muslims of today might be able to understand them even better than the Muslims of his own time. The sermon can be understood as a call to Muslims of all times, including those of today, to examine and verify for themselves what *Shariah* really teaches. A Muslim's ultimate aim should, therefore, be to filter Islamic law in the light of the Qur'an and the *Sunnah* and, if necessary, to re-interpret them while taking their core values into account.

The chapter, further, discusses the notion of the purpose of *Shariah* (*maqased al-Shariah*), and introduces the principles of necessity and of reality (*fiqh al-darurah* and *fiqh al-waqa*) that allow for exceptions to what is prohibited, if these are necessary to secure the benefit of the people. It is due to these principles that *Shariah* is known to be flexible enough to suit at all times and in all environments.

The chapter critically discusses two main obstacles preventing Islamic jurists from amending *hudud* ordinances. The first of these derives from an interpretation of the notion of the five indispensables that elevates the protection of religion above the protection of the individuals' rights. It is argued that this reading is incorrect, and that human efforts to protect the religion, in fact, violate *Shariah*. The second obstacle, also refuted in the chapter, is the claim that *hudud* ordinances cannot be questioned since they concern the rights of Allah.

In Chapter 6 suggestions are developed to reform *hudud* punishments in order to make them compatible with international human rights standards. The chapter consists of three parts. The first is introductory in nature; in it is explained why *hudud* punishments need to be amended. Further, a widespread contemporary Muslim theory is introduced, according to

which *hudud* ordinances can be applied in a perfect society only.⁶⁵ Also discussed is the purpose of punishment, especially the aspect of deterrence that is considered by orthodox Muslims as the main aim of the *hudud* punishments.⁶⁶ It is due to this understanding that the *hudud* punishments assigned by Islamic jurisprudence are so cruel and emphasise the use of torture.⁶⁷

The second part discusses the legal challenge in respect of amending *hudud* ordinances. The most important of these challenges derives from the understanding that *hudud* ordinances are part of what is known as ‘definite texts’ (*nusus qataiyah*) that are immutable and cannot be questioned.⁶⁸ It is also shown that *Shariah* proves to be flexible enough to overcome this seemingly insurmountable obstacle, thanks to the principles of necessity and reality and the principle of doubt.⁶⁹ Several examples are introduced from the Qur'an and the *Sunnah* that demonstrate that the Prophet and his companions and successors applied the aforementioned principles and suspended *hadd* punishments if this were necessary for the benefit of the people.

In the second part a re-reading of the five indispensables is suggested, more specifically a re-interpretation of the protection of religion since it is its current interpretation that is responsible for some of the *hudud* punishments developed by Islamic jurists that severely violate human rights and contradict some of the core teachings of *Shariah*.

In the third and main part of the chapter the *hudud* ordinances are discussed individually, and suggestions for alternative punishments are developed in a religiously sensitive manner. For those *hudud* punishments that have been developed by Islamic jurists in the application of *ijtihad*, the chapter is similarly used to develop alternative suggestions. For the *hudud* crimes with punishments assigned in the Qur'an and thus considered as ‘definite’ prescriptions, the principles of reality and necessity and the principle of doubt are applied to develop alternative punishments that are compatible with international human rights standards and that serve the fulfilment of the purpose of *Shariah* by securing the benefit of the people.

Chapter 7 concludes the thesis and includes a summary of the main findings and recommendations from an academic and legal perspective.

⁶⁵ Muhammad Abu Zahra *Al-Uqubah fi al-Shariah al-Islamiyah* (2003) 27.

⁶⁶ Al-Dawlah op cit note 26.

⁶⁷ Etim E Okon ‘Hudud punishments in Islamic criminal law’ (2014) 10 (14) *European Scientific Journal* 227.

⁶⁸ Yusuf al-Qaradawi *Al-Fiqh al-Islami beina al-Asalah wal-Tajdid* (1999) 45.

⁶⁹ Ibrahim Abu Suleiman Abdul Wahab *Fiqh al-Darurah wa Tatbiqatuhu al-Muaserah* (2003).

CHAPTER 2 – ISLAMIC CRIMINAL LAW

I Introduction

Any attempt to reform Islamic criminal law in order to make it compatible with international human rights laws has above all to focus on reforming *hudud* punishments, for it is their harsh, cruel and humiliating punishments that are the cause of the main conflict with human rights. Orthodox Muslims, however, usually block out any attempt of questioning or reforming *hudud* punishments. They claim that *hudud* ordinances are a fixed set of a specific number of crimes and punishments that cannot be questioned, amended or forgiven since they are divinely assigned, infallible and non-negotiable.⁷⁰ This chapter aims to refute this claim on several grounds. It is argued that the claim is based on the failure to distinguish between *Shariah* and Islamic law. Since the two terms are often used interchangeably, several *hudud* prescriptions are falsely believed to be divine, even though they have no legal basis in the Qur'an or the correct⁷¹ *Sunnah*. Some of them can even be argued to contradict the Qur'an.⁷² It is stressed therefore, that it is very important to distinguish between *Shariah* and Islamic law.

The first part of this chapter, therefore, clarifies the difference between *Shariah* as referring to the divinely assigned rules and regulations recorded in the Qur'an and the correct *Sunnah*, and Islamic law as including additionally the rulings developed by the Islamic jurists. Since these are based on human interpretations and opinions, they are not divine or infallible. In this first part of the chapter, the primary, secondary, and some of the subsidiary sources of *Shariah* are introduced.

The second part of the chapter discusses the role of Islamic jurisprudence (*fiqh*), including the historical development of the four main Sunni schools of jurisprudence.

The third part of the chapter refutes the claim that the set of *hudud* ordinances consists of a specific number of divinely prescribed crimes and their punishments. It points out that there is not one specific number of crimes that all Islamic scholars agree on.

Further, the meaning of the term *hudud* (sing. *hadd*) is explored. This definition is significant, because the claim that *hudud* punishments cannot be amended or forgiven by anyone else than Allah himself, is based on the presumptions that *hudud* refers to the right of

⁷⁰ The Muslim orthodox position which defends this claim is discussed in depth in Chapter 5.

⁷¹ 'Correct' *Sunnah* refers to all the *ahadith* (sing. *hadith*) that have been acknowledged as authentic and reliable. Viz op cit 29. A further explanation will follow in this chapter.

⁷² Umar Suleiman al-Asqar *Al-Madhkal ela al-Sharia wa al-Fiqh al-Islami* (2005) 16.

Allah,⁷³ and the term *hudud* refers to punishment. This chapter demonstrates that the term *hudud* does not refer to the punishments, but to crimes, or to the limit or boundary identifying what is prohibited and what is permissible.

Thirdly, this part of the chapter points out the contradictions between the *hudud* prescriptions developed by Islamic jurisprudence and the prescriptions found in the Qur'an. This comparison demonstrates that not all *hudud* punishments have been divinely prescribed.

This chapter, thus, demonstrates that it is legitimate and necessary to reconsider the set of *hudud* punishments developed by Islamic jurisprudence, since it does not correctly reflect the prescriptions of the Qur'an and the *Sunnah*, and cannot be considered fully divine or infallible.

II *Shariah* versus Islamic law

The failure to distinguish between *Shariah* and Islamic law is one of the main factors that strengthens the argument of orthodox Muslims that *hudud* ordinances are divine, infallible, immutable and non-negotiable. However, here it is stressed that it is very important to understand the differences between them. It is *Shariah* that indeed can be considered to be divine and infallible, for it refers to the legal provisions contained in its primary sources, namely the Qur'an, and the correct *Sunnah*.⁷⁴ The Qur'an is considered to be the perfect word of Allah, and the correct *Sunnah* contains the life record of the Prophet Muhammad and is considered to be divine since the Qur'an declares that the Prophet was guided by divine inspiration.⁷⁵

The Arabic term *Shariah* refers to 'the straight path'⁷⁶ or 'the right way' mentioned in Surah 45:18.⁷⁷ The Qur'an describes this path as being designed by Allah to guide believers in their daily lives. *Shariah* is a complete system that governs all aspects of life.⁷⁸ It is considered eternal, and as being flexible and fitting for all times, places and circumstances.⁷⁹

⁷³ Abdullah Ahmad Qaderi *Al-Hudud wa al-Sultan* (1986) 19.

⁷⁴ Muhammad Abu Zahra *Shariaht al-Quran min Dalael Eajazuh* (1961) 17.

⁷⁵ Surah 53:2-5.

⁷⁶ Abdullah Saleh 'Madchal lielm al-fiqh al-Islami' available at <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=1176>, accessed on 17 July 2014.

⁷⁷ Surah 45:18.

⁷⁸ Abdullah Saleh has described *Shariah* as 'a complete system that governs all aspects of life' and 'the set of provisions that was revealed to the Prophet'. See Saleh op cit note 76. El-Shahat Ibrahim Mansour declares: '*Shariah* consists of the infallible provisions that derive from the definitive and consistent [holy] texts that confirm the divine orders.' El-Shahat Ibrahim Mansour *Al-Madecal fi Shariah al-Islamiya* (2007) 13.

⁷⁹ Taha Jaber al-Alwani *Nahw al-Tajdid wa al-Ijtihad* (2008) 60.

Islamic law, by contrast, is based not only on *Shariah* but also on Islamic jurisprudence (*fiqh*),⁸⁰ the legal science of interpreting *Shariah* which is based mainly on human reasoning (*ijtihad*).⁸¹ Islamic law can, therefore, not be considered infallible or fully divine, for it encompasses not only to the divinely assigned rules and regulations presented in the Qur'an and in the *Sunnah* (*Shariah*), but also to all those developed by the human interpretations of the Islamic scholars and jurists (*fuqaha*, sing. *faqih*)⁸² in their attempts to interpret the provisions of *Shariah* whenever a problem or question arises that is not explicitly answered in the Qur'an or the *Sunnah*. Since these provisions developed by Islamic jurists throughout the centuries are based on human understanding and opinions, they are not infallible.⁸³ This is particularly so since the Islamic jurists can be influenced by political and other interests. They can be wrong and be questioned,⁸⁴ especially if they contradict the primary sources of *Shariah*.⁸⁵ Many moderate Muslims, therefore, point to Islamic jurisprudence as the main problem causing the clash of Islamic law with human rights.

Since the legal opinions issued by the *fuqaha* (*fatwas*) become part of Islamic law, Islamic law can be described as the law that is based on *Shariah* and Islamic jurisprudence.⁸⁶

(a) Sunni primary sources of *Shariah*

The first two primary sources of *Shariah* are the Qur'an and the correct *Sunnah*.

i. Qur'an

As mentioned earlier, the Qur'an is considered to be the infallible word of Allah.⁸⁷ The Qur'an declares that it was revealed through the angel Gabriel⁸⁸ to the Prophet Muhammad, as the ultimate, divine guideline to lead Muslims in their daily life.⁸⁹ The Qur'an is considered to cover all the necessary guidelines for this life and the life to come. Thus, it is dealing with

⁸⁰ El-Shahat Ibrahim Mansour describes Islamic law as the law that is based on Islamic *Shariah* and Islamic jurisprudence. See Mansour op cit note 78.

⁸¹ Mohammad Hashim Kamali *Shari'ah Law: An Introduction* (2008) 16, 41 and 100.

⁸² El-Shahat Ibrahim Mansour describes Islamic law as the law that is based on Islamic *Shariah* and Islamic jurisprudence. Mansour op cit note 78.

⁸³ Muhammad Ali al-Masri 'Hal al-ijtihadat a fiqhiyah juz min al-Shariah al-islamiyah' (2014) *Al-Gabha al-Salafia*, Cairo, available at <http://gabhasalafia.com/archives/3527#.U3W3216Qz1o>, accessed on 16 May 2014.

⁸⁴ Ibid.

⁸⁵ Hureyah Taglapt *Al-Fiqh al-Islami Beyna al-Assalah wal Tajdid* (unpublished PhD thesis University of Banha, 2008) 37.

⁸⁶ El-Shahat Ibrahim Mansour describes Islamic law as the law that is based on Islamic *Shariah* and Islamic jurisprudence. Mansour op cit note 78.

⁸⁷ Surah 2:2.

⁸⁸ Surah 2:97.

⁸⁹ Surah 16:89.

matters of religion but also covering all aspects of life, from eating and drinking to social life, economy, the judiciary and politics.⁹⁰

According to Surah 122, the Qur'an, written in classical Arabic,⁹¹ was sent down in Arabic so that the people could learn wisdom. The Prophet Muhammad is believed to have been able to impart it to different Arab tribes in seven different Arabic dialects.⁹² The Qur'an is believed to have been revealed intermittently and through the concept of *tangeem* that means 'gradually', according to the events and incidents in the life of the Prophet Muhammad and the early Muslim community.⁹³ The Qur'an is believed to have been transmitted consistently from generation to generation with the same word pronunciation and free from corruption.⁹⁴ The Qur'an itself declares that it is perfect and free of any error,⁹⁵ and in Surah 15:9 Allah declares that He will protect it from any human corruption.⁹⁶

ii. *Sunnah*

The *Sunnah*, as previously mentioned, refers to the record of the Prophet Muhammad's life example,⁹⁷ especially those aspects that have not been mentioned in the Qur'an.⁹⁸

The *Sunnah* contains all the reports (*ahadith*) of what the Prophet said or did, including the statements and deeds of his companions, that have been approved by the Prophet either silently or explicitly. Accordingly, three categories are distinguished: The *Sunnah* of sayings,

⁹⁰ Al-Daqaq and Fattah explain: 'The Quran is considered to be the infallible word of Allah that was given as a final revelation containing Allah's guidelines for Muslims for this life and the life after. Concerning this life, these guidelines are considered to cover every aspect of the daily life and every function of the Muslim society from eating and drinking to the system of government. These guidelines include not only religious and social life but also politics, economy and [the] judiciary.' Al-Daqaq & Fattah op cit note 41 at 13–25.

⁹¹ Al-Daqaq and Fattah explain that the 'word and the meaning of the Quran... was revealed from Allah through his angel Gabriel to His Messenger, the Prophet Muhammad (see Surah 26:195). The text of the Quran is classical Arabic. Therefore whenever the Quran is translated from Arabic into a different language, this translation is not acknowledged as the Quran, but as a translation of the meaning of the Quran. The original is designed, constructed and formed in classical Arabic.' Al-Daqaq & Fattah op cit note 41.

⁹² Nizamuddin Hassan Bin Mohammed Alnaisaburi *Garaeb al-Quranwa Ragaeb al-Furqan* (1996) 9.

⁹³ Al-Daqaq & Fattah op cit note 41 at 13–25.

⁹⁴ Al-Daqaq and Abdul Fattah explain that the 'Quran is believed to have been transmitted by the method of *tawatur*, which means 'transmission based on knowledge and certainty'. Ibid.

⁹⁵ Surah 39:28 'as a discourse in the Arabic tongue, free of all deviousness, so that they might become conscious of God.'

⁹⁶ Surah 15:9 'We have, without doubt, sent down the Message; and We will assuredly guard it (from corruption).'

⁹⁷ Muhammad al-Shawkani *Ershadal-Fuhul ela Tahqeq Elm al-Usul* (1998) 128.

⁹⁸ Abu Ishaq al-Shatibi *Al-Muwafaqat fi Usul al-Shariah* (2004) vol 4 at 2.

the *Sunnah* of deeds, and the *Sunnah* of confirmations, also known as ‘the sayings and deeds of the companions’ (*afaal wa aqaul assahabi*).⁹⁹

Since the life example of the Prophet Muhammad is declared to be the ultimate example for Muslims, and a perfect pattern of conduct,¹⁰⁰ it is considered to have the same authority as the Qur'an.¹⁰¹ The Qur'an points out that Muslims should obey the Prophet Muhammad to the same extent as they obey Allah.¹⁰²

It is important to note, though, that not all *ahadith* have the same level of authority. The ‘correct *Sunnah*’ refers to all the *ahadith* that have been acknowledged as authentic and reliable. The reliability of an individual *hadith* depends to a great extent on the level of reliability of the chain of (oral) transmission (*isnad*) from its source until it was written down. Depending on several factors, including the reliability of the chain of narrators, some *ahadith* are considered to be weak or even wrong, while others are widely accepted as ‘correct’. Many *ahadith*, as early as the first century AH, had been rejected as fabricated and faked. The science of *hadith*,¹⁰³ therefore, developed rules and guidelines to distinguish whether or not a specific *hadith* can be considered correct (*sahih*) or not.¹⁰⁴

Three types of *ahadith* can be distinguished¹⁰⁵ namely, *hadith mutawater*,¹⁰⁶ *hadith mash'hur*,¹⁰⁷ and *hadith ahad*.¹⁰⁸ The most reliable type of *hadith* is the *hadith mutawater*. This describes *ahadith* about the Prophet narrated by one or several of his companions and transmitted by a chain of narrators, all of whom are known to be fully honest, reliable and trustworthy. This kind of *ahadith* has the same authority as a qur'anic verse. *Hadith mash'hur*

⁹⁹ Al-Daqaq & Fattah op cit note 41 at 28–9; According to al-Amidi ‘*sunnah* is referring to the rituals that have been transmitted from the Prophet and it can refer to what has been delivered by the Messenger concerning legal evidence which cannot be read in the Qur'an and this includes his sayings, his deeds and his confirmations.’ Abu al-Hasan Ali Bin Salim al-Amidi *Al-Ahkam* (2003) vol 1 at 169.

¹⁰⁰ Surah 33:21.

¹⁰¹ Al-Alwani op cit note 79.

¹⁰² Surah 4:80 and Surah 59:7.

¹⁰³ The science of *hadith* deals with the study of the collection of *ahadith* including the study of the collection of *ahadith* and their organisation as established by the early Islamic scholars.

¹⁰⁴ Saadia Musa Omar and Iqbal Abdul Baqi ‘Significant changes in the meaning and role: A study of hadith’ (2012) 5 *Journal of Science and Islamic Research*, available at http://islamicjournal.sustech.edu/content_details.php?id=487&chk=619c9ce75eeb8879f40035dc3ada6416, accessed on 27 September 2014.

¹⁰⁵ Al-Daqaq & Fattah op cit note 41 at 28.

¹⁰⁶ *Hadith* about the Prophet narrated by one or several of the companions of the Prophet and transmitted by a chain of narrators that are all known to be fully honest, reliable and trustworthy. This kind of *hadith* has the same authority as a qur'anic verse.

¹⁰⁷ *Hadith* about the Prophet narrated by one or several of the companions of the Prophet and transmitted by a chain of narrators, with most of the narrators, especially the last one, known to be trustworthy. Just one or very few of the narrators are questionable.

¹⁰⁸ *Hadith* about the Prophet narrated by one or several of the companions of the Prophet and transmitted by a chain of narrators that does not reach the level of *hadith mutawater*. *Ahadith ahad* are *hadith* that are not considered fully authentic.

refers to *ahadith* with a slightly limited level of reliability, as there is no full assurance of the reliability and trustworthiness of *all* the narrators, even if most of them, including the last one, are known to be trustworthy. *Hadith ahad* is the weakest type of *hadith* as it is not regarded as trustworthy.

The *ahadith* that have been acknowledged as correct have been put together in six famous collections of authenticated *ahadith*. The two most famous are *Sahih Bukhari* and *Sahih Muslim*. The Arabic term *Sahih* means ‘correct, true or valid’. The other four are the *Sunan al-Nasa’i*, *Sunan Ibn Majah*, *Sunan at-Tirmidhi* and *Sunan Abu Dawud*.

The correct *Sunnah* is, as previously mentioned, considered to be divine. This understanding is based on Surah 53:2-5 that states when referring to the Prophet Muhammad: ‘This fellow-man of yours has not gone astray, nor is he deluded, and neither does he speak out of his own desire that [which he conveys to you] is but [a divine] inspiration with which he is being inspired.’ Not all the provisions of the *Sunnah*, however, can be considered to be divine. In particular, those that contradict the Qur’an are not. It is due to the existence of a large number of weak — and even false *ahadith* — that the expression ‘correct *Sunnah*’ is commonly used to specify that the weak and false *ahadith* are excluded.

Weak *ahadith* (*ahadith ahad*) play a considerable role in the dispute between orthodox and moderate Muslims concerning *hudud* ordinances, as moderate Muslims do not acknowledge *ahadith ahad* as legitimate evidence to justify the punishments proposed in any of the *hudud* ordinances.¹⁰⁹ Since the offences covered by the *hudud* ordinances are serious crimes with serious punishments, the legal evidence to support them has to be strong and fully trustworthy. The *hadith* narrated by Ikrimah¹¹⁰ and recorded by Imam Bukhari that says ‘whoever changes his religion, kill him’, for example, is a *hadith ahad*.¹¹¹ This kind of *hadith* should therefore not be acknowledged as sufficient evidence to legitimise the death penalty for the crime of apostasy. When dealing with *hudud* crimes and their punishments, it is therefore important to discern whether a *hadith* can be considered reliable and correct (*sahih*) or not.

It is the debated use of *ahadith ahad* as the legal basis for *hudud* punishments that is the first and fundamental aspect that weakens the Islamic claim that these punishments are divine and infallible. Another weakness of *hudud* ordinances results from the wide

¹⁰⁹ Sayyid Qutb *Fi Zilal al-Qur’an* (2010) vol 6 at 4008.

¹¹⁰ *Sahih al-Bukhari* vol 9 at 84 *hadith* 57.

¹¹¹ Taha Jaber al-Alwani ‘Okazat al-siyasiin al-mufalisin: Al-hudud’ 25 May 2014, available at http://www.alwani.net/مكتبة/مقالات/مقالات_كبرى_عقوبات/عنكازات/item/489.html, accessed on 27 September 2014.

interpretations of Islamic jurists, who in their attempt to interpret the divine sources of *Shariah*, use many different methods of interpretation.

(b) Secondary and subsidiary sources of *Shariah*

Islamic jurisprudence takes into consideration a number of secondary sources of *Shariah*. The two most important ones are the principle of analogical deduction (*qiyas*) and the consensus of the Islamic scholars (*ijma*). Some orthodox scholars, especially scholars of the Hanbali school, consider these two principles even as part of the primary sources along with the Qur'an and the *Sunnah*. They call them *al-usul al-arbaa* (the four primary sources).¹¹²

i) Analogical deduction (*qiyas*)

The principle of analogical deduction (*qiyas*) is used to determine a ruling for cases that are not mentioned in the Qur'an or the *Sunnah*, by applying analogical deduction from similar cases mentioned in them. An example of its early use concerns the consumption of alcohol. The Qur'an speaks about the prohibition of *al-khamr* (alcohol made out of dates or other fruits — not including grapes). Although wine (*nabiz*) is not mentioned, Muslim jurists used the concept of analogical deduction to declare that wine will be treated the same way as other alcoholic drinks (*al-khamr*).¹¹³

ii) Consensus of the scholars (*ijma*)

The consensus of the scholars (*ijma*) refers to the agreement of the qualified Islamic scholars (*mujtahids*) on a specific legal stipulation.

Besides the two aforementioned sources of Sunni jurisprudence, there are several other subsidiary sources, including the sayings of the companions (*qawl al-sahabi*), traditional customs (*al-urf*) and the *Shariah* of those from past times (*Shara man qablana*) that will not be discussed in detail here. The following three subsidiary sources, however, are of special interest to this research, since they are designed to consider the public interest and the benefit of the people and thus reflect the main purpose of *Shariah*.¹¹⁴ These are the principle of consideration of the public interest (*al-masalih al-mursalah*), the juristic preference (*istihsan*) and the blocking of means (*sadd al-zara'i*).

¹¹² Al-Daqaq & Fattah op cit note 41 at 11.

¹¹³ Ibid at 35–6.

¹¹⁴ Al-Daqaq & Fattah op cit note 41 at 43.

iii) Consideration of public interest (*al-masalih al-mursalah*)

The method of consideration of the public interest (*al-masalih al-mursalah*) that has been addressed by both the Qur'an and the *Sunnah*, provides an effective tool for Islamic jurists to consider the public interest of Muslim society whenever they have to handle cases and disputes that arise from changing life circumstances over time.¹¹⁵ *Al-masalih al-mursalah* allows jurists to develop provisions that benefit the people or protect them from harm. This is an important consideration as far as Islamic legislation is concerned, since it reflects the main purpose of *Shariah*.¹¹⁶

iv) Juristic preference (*istihsan*)

The principle of juristic preference is another tool that allows Islamic jurists to choose what will be best for the people whenever they have to pass a verdict.¹¹⁷ The Arabic term *istihsan* means 'preference', and in Islamic jurisprudence the term refers to the principle that gives the Islamic scholars (*mujtahidin*) the liberty to use their own preference vis-à-vis a specific judgment, thereby allowing them to choose the option which they deem best for the people. The principle of *istihsan* sets the benefit of the people as one of the highest purposes (*makased*) of *Shariah*.

v) Blocking of means (*sadd al-zara'i*)

The definitions of this principle presented by Muslim scholars differ slightly from each other, but in summary the common idea is that the principle of blocking of means (*sadd al-zara'i*) is designed to protect Muslim society from harm and to achieve what is beneficial for it by closing any door that can lead to harmful results for the people. In other words, the principle aim is to prevent causes that can lead to evil.¹¹⁸ Ibn Qayyim Al-Jawziyyah says that: 'Doors

¹¹⁵ An example for *al-masalih al-mursalah* can be seen in a *hadith* that reports that the Prophet gave the people who were pollinating the palm trees the liberty to do what they deem best. He stressed that they do not have to follow his opinion except if he says something about Allah. *Sahih Muslim, hadith 2361*.

¹¹⁶ Al-Daqaq & Fattah op cit note 41 at 43.

¹¹⁷ Saad Bin Matar al-Otaibi 'Usus al-siasa al-shariah: Al-istahsan' *Said al-Fawaed*, available at <http://www.saaaid.net/Doat/otibi/27.htm>, accessed on 27 September 2014;

Al-Daqaq & Fattah op cit note 41 at 39.

¹¹⁸ Al-Shatibi op cit note 98 at 114;

Ibn Taymiyyah explains *sadd al-zara'i* as: 'the method to know the cause, which, in the eyes of Islamic scholars, is, what led to the forbidden act.' Ibn Taymiyyah *Al-Fatawa al-Kubra* (1987) vol 3 at 139.

Al-Quraafi said: '*Sadd al-zara'i* is the method that is using the permissible or the prohibited to achieve the beneficial.' Ahmed Ibn Idris al-Quraafi *Al-Furuq* (1998) vol 2 at 61;

Khaled Ali Suleiman Bani Ahmed 'Qaedat sadd al-zara'i' (2009) 25 *Majalat Gameat Dimashq lel Alum al-*

that can lead to evil should be closed and doors that can lead to a benefit should be opened.’¹¹⁹ Some scholars, including Imam al-Qaraafi, say that the method of *sadd al-zara’i* allows using whatever method is necessary to achieve what is beneficial, or to block what is harmful to the people.¹²⁰

All three principles reflect the qur’anic teaching that the benefit of the people and protecting people from harm is the main purpose of *Shariah*.¹²¹ Another closely connected famous Islamic principle further states explicitly that ‘harm must be removed’ (*al-darar yusal*). This principle derives from a correct *hadith*, that states that harm must be removed (*la darar wa la derar*).¹²²

This principle can be seen also in Ibn Kathir’s interpretation of Surah 7:157, according to which the Qur’an declares that one of the main reasons for the coming of the final Prophet is to take away the burdens that previous religious leaders have placed on the shoulders of the people.¹²³ Ibn al-Qayyim explained this principle in his own words, as follows:

Sharia is founded upon wisdom and welfare for the servants in this life and the afterlife. In its entirety it is justice, mercy, benefit, and wisdom. Every matter which abandons justice for tyranny, mercy for cruelty, benefit for corruption, and wisdom for foolishness is not a part of the Sharia even if it was introduced therein by an interpretation.¹²⁴

Since the above principles are designed to help Islamic jurists to develop rules and regulations that serve the benefit of Muslim society, this thesis suggests that if these sources were applied in a correct and positive way, it will be possible to experience the hermeneutic flexibility of *Shariah* first hand. If it is presumed that human rights benefit society, it can be contended that the abovementioned sources allow for an interpretation of *hudud* ordinances different from that currently widely accepted by orthodox Muslims. Chapter 6 will further explore how these sources can be applied to reconcile Islamic law with international laws of human rights.

Iqtisadia wal Qanuniyah 734, available at <http://www.damascusuniversity.edu.sy/mag/law/images/stories/705-742.pdf>, accessed on 27 September 2014.

¹¹⁹ Ibn al-Qayyim al-Jawziyyah op cit note 36 vol 3 at 108.

¹²⁰ Al-Quraafi op cit note 118, vol 2 at 42.

¹²¹ Al-Daqaq & Fattah op cit note 41 at 43.

¹²² Yahya Ibn Sharaf Al-Nawawi *Shareh Maten al-Arbaaun al-Nawawiyah fi al-Ahadith al-Saheha al-Nabawiyah* 4 ed (1984) 87.

¹²³ Ismail Ibn Umar Ibn Kathir *Tafsir Ibn Kathir* (2002) vol 3 at 489.

¹²⁴ Ibn al-Qayyim al-Jawziyyah op cit note 36 at vol 3 at 14.

III Islamic jurisprudence (*fiqh*)

As previously mentioned, *fiqh* (Islamic jurisprudence) can be described as the understanding of the Islamic scholars and jurists who try to interpret the rules and regulations of *Shariah* whenever a problem or question arises that is not answered explicitly in the *Qur'an* or the *Sunnah*. In order to develop a new legislation for an issue, the Islamic scholars (*mujtahid*) practice *ijtihad* (independent reasoning).¹²⁵ This means that they bring the utmost effort to reach a legal practical opinion through elicitation.¹²⁶ In other words, the Islamic scholars have to apply the spirit and basic principles of *Shariah* by using their logic or other methods of interpretation, including the aforementioned methods of *qiyaz* (analogical deductions), *ijma'a* (consensus of opinion), *istihsan* (juristic preference), *masalih al-mursalah* (consideration of public interests) and *sadd al-zarai* (blocking of means).¹²⁷

Al-Alwani explained that in order to find an answer for a legal case, an Islamic scholar has to search first in the *Qur'an*, and if he cannot find an answer there, he should apply the *Sunnah*, and if he cannot find an answer there, he should use his own opinion (apply *ijtihad*).¹²⁸

This is the commonly used practice of Islamic scholars when searching for a ruling concerning an issue not explicitly covered by the primary sources.¹²⁹ It goes back to the Prophet Muhammad, his companions and the first four caliphs.¹³⁰

One of the first examples of the application of *ijtihad* is reported in a *hadith* that speaks about the Prophet's companion Mu'az. When the Prophet Muhammad sent him to Yemen to rule the Muslim community there, the Prophet asked him how he was planning to handle legal cases. Mu'az answered that he would rule them according to the book of Allah. When the Prophet asked what he would do if he cannot find an answer in the *Qur'an*, Mu'az replied that he would use the *Sunnah*. When asked, what he would do, if he could not find an answer in the *Sunnah*, Mu'az declared that he would apply his own opinion and apply *ijtihad*. The

¹²⁵ Al-Qaradawi op cit note 36 at 84.

In the *hadith* the principle of *ijtihad* was presented by the Prophet's companion Mu'az, who was sent to Yemen. Answering the Prophet's question as to what he would do if he were to rule in a legal dispute, Mu'az explained that his rule would depend upon what is written in the word of Allah, and if he would not find the answer in the book of Allah or the *Sunnah* he would use *ijtihad*. Ibn al-Qayyim al-Jawziyyah op cit note 36.

¹²⁶ Al-Shawkani op cit note 97.

¹²⁷ 'Fatawa about the concept of sadd al-zarai' *Dar-Alifta* 7 March 2012, Cairo, available at <http://www.dar-alifta.org/ViewFatawaConcept.aspx?ID=113&LangID=1>, accessed on 16 May 2014.

¹²⁸ Al-Alwani op cit note 17 at 62.

¹²⁹ Gamal al-Banna 'Al-islah al-islami al-manshud' 18 (Symposium 27-29 September 2004, Cairo), available at http://www.islamiccall.org/Dirasat_IslahManshud.htm, accessed on 10 June 2014; Al-Alwani op cit note 17 at 52.

¹³⁰ Gamal al-Banna *Qadiat al-Fiqh al-Jadid* (2008) 40.

Prophet praised him for his answer.¹³¹ *Shariah* praises any effort made to apply *ijtihad* as honourable¹³² and praiseworthy, and declares that any effort of interpretation will be rewarded, even if the interpretation is wrong; and if it is correct it will be doubly rewarded.¹³³

Ijtihad can be described as the mechanism to implement the teachings of the primary sources to all the practical legal questions that arise in the life of the Muslim society.¹³⁴

The field of Islamic jurisprudence (*fiqh*) is an ‘extremely large and very complex topic of Islamic studies’.¹³⁵ It can also be described as the area of legal study pertaining to the stipulations of the Qur’an and the *Sunnah* concerned with the duties, rights and responsibilities of the Muslim community.¹³⁶

The wide and complex field of Islamic jurisprudence that is based on the different understandings and opinions of Islamic scholars and jurists and draws from different sources and methods of interpretation led to the development of different interpretations and thus to the emergence of different schools of jurisprudence. In the following section the historical development of the field of Islamic jurisprudence and the main four Sunni schools of jurisprudence are described.¹³⁷

(a) The historical development of Islamic jurisprudence (*fiqh*)

The development of the field of Islamic jurisprudence began after the death of the Prophet Muhammad, when the extension of the Islamic state took on a completely new dimension and

¹³¹ Yusuf al-Qaradawi *Nahw al-Ijtihad fi al-Shariah al-Islamiyah* (1996) 84; Ibn al-Qayyim al-Jawziyyah op cit note 36.

¹³² Mohamed al-Tahar Ibn Ashour *Maqased al-Shariah al-Islamiyah* (2000) 408.

¹³³ Muhammad Ibn Ismail al-Bukhari *Sahih al-Bukhari* translated by Muhammad Muhsin Khan (1997) vol 9 at 271 *hadith* 7352.

¹³⁴ Throughout Islamic history there have been some Islamic scholars who rejected practicing *ijtihad*. Many of them claim(ed) that ‘the door of *ijtihad* has been closed’. There is however no general consensus on this view. Many scholars agree that ‘*ijtihaad* is an integral part of Islamic legal theory’ and they believe in ‘*ijtihad*’s importance in Muslim’s daily life’. Salih Kesgin ‘A critical analysis of the Schacht’s argument and contemporary debates on legal reasoning throughout the history of Islamic jurisprudence’ (2011) 4 (19) *The Journal of International Social Research*, available at www.sosyalarastirmalar.com, accessed on 12 August 2016.

¹³⁵ The *Islamic Dictionary* explains Islamic jurisprudence as ‘an extremely large and very complex topic of Islamic studies. The meaning of the Arabic term ‘*fiqh*’ is ‘understanding’, ‘comprehension’, ‘knowledge’, or ‘jurisprudence’. A jurist is called a ‘*faqih*’ (plur. *fuqaha*) which means an expert in matters of Islamic legal matters. A ‘*faqih*’ passes verdicts within the rules of the Islamic law, namely *Shariah*.’ *Islamic Dictionary*, available at <http://www.islamic-dictionary.com/index.php?word=fiqh>, accessed on 11 June 2014.

¹³⁶ The broadly recognised traditional definition of the term *fiqh* describes it as ‘the knowledge of the practical legal provisions which are gained from its detailed evidences (*Al-a’elem bil ahkam al sharaiyah al-amaliyah al-muktasaba min adelatiha al tafsiliyah*)’. Hassan Abdul Ghani ‘Mana kalamat fiqh’, 17 February 2013, available at <http://fiqh.islammesssage.com/NewsDetails.aspx?id=6153>, accessed on 17 July 2014.

¹³⁷ ‘Al-Madares al-Salafia al-Moasera: Qera’a fi al-tanaau wal elaka bil achar’ *Al-Alukah Network* 21 May 2011, available at <http://www.alukah.net/web/triqi/0/32046/>, accessed on 16 May 2014.

Islam spread to the whole of the Arabian Peninsula and beyond. Many countries, including Egypt, Iraq, Syria and Iran, fell under the power and authority of Islam and the ethnic groups in these countries became subject to *Shariah*. The early Muslim scholars, therefore, had to introduce the rules and regulations of *Shariah* to this new Muslim community. They were required to apply and interpret the rules and regulations of the Qur'an and the *Sunnah* to the specific challenges, circumstances and the legal questions of their new Muslim co-religionists. The questions and cases that arose in the new Muslim societies had to be addressed in a way that it would reflect the purpose of *Shariah*.¹³⁸

In the development of the field of Islamic jurisprudence several stages can be distinguished. The lifetime of the Prophet Muhammad can be seen as the first stage, the time of the four successors until the middle of the first century after the Hijra (AH)¹³⁹ as the second. During these first two stages, the foundation of Islamic jurisprudence is believed to have been laid.

It was during the third stage that Islamic jurisprudence was identified as a separate science of study with its own methods, rules and regulations, and that Islamic schools of jurisprudence were established.¹⁴⁰ This third stage started in the second half of the first century AH and lasted until the first half of the second century AH.

In the fourth stage, Islamic jurisprudence was fully developed as a science and the Islamic scholars worked with diligence and great effort to develop new rulings by exploring the will and law of God and applying legal rules and principles (*usul al-fiqh*).¹⁴¹ By means of the elicitation of the Qur'an and *Sunnah*, the scholars undertook every effort to reach legal practical opinions to find a solution for every case or problem.¹⁴² This process of the scholars' independent legal reasoning (*ijtihad*) reached its highest level at this fourth stage that commenced at the beginning of the second century AH and lasted until the middle of the fourth century AH.¹⁴³

The fifth stage is considered to be the golden era of Sunni Islamic jurisprudence, for the different Islamic schools of jurisprudence had reached the peak of their development.¹⁴⁴ This

¹³⁸ Yasser al-Mashhadani 'Dor al eraqeen fi tatweer al muasasah al qadaeyah' *Al-Fustat*, available at http://efustat.blogspot.de/2013/07/blog-post_2377.html, accessed on 27 September 2014.

¹³⁹ 'Anno Hegirae' or 'After Hijrah'. Hijrah means 'emigration'. The Islamic calendar starts from the day the Prophet Muhammad emigrated (the *hijrah*) from the city of Mecca to the city of Medina in 622 AD.

¹⁴⁰ Taglapt op cit note 85.

¹⁴¹ Wael B Hallaq 'Was the gate of ijtihad closed?' (1984) 16 *International Journal of Middle East Studies* 3–41.

¹⁴² Al-Shawkani op cit note 97 at 250.

¹⁴³ Taglapt op cit note 85.

¹⁴⁴ Ibid.

stage started in the middle of the fourth century AH and lasted until the fall of Baghdad in the middle of the seventh century AH.

The sixth stage, by contrast, is considered to be the weakest period in the history of Islamic jurisprudence due to the disappearance of the scholars' independent legal reasoning (*ijtihad*). The scholars no longer developed new rulings, but instead practised the concept of *taqlid*. This means they followed the interpretations and decisions of earlier scholars without necessarily asking for evidence to support them or examining the reasons for these rulings.¹⁴⁵ This stage started from the second half of the seventh century AH and lasted until 1293 AH.

Due to the number of possible ways and approaches to interpret the primary sources of *Shariah*, a number of different schools of jurisprudence emerged during the third and fourth stage of this development. This was when Islamic scholars worked with great energy to explore the will and law of God and to develop new rulings.

(b) The four main Sunni schools of Islamic jurisprudence

The Hanafi, Maliki, Shafei, and Hanbali schools are considered to be the main four Sunni schools of jurisprudence. The main differences between them can be seen in the methods of interpretations they use.¹⁴⁶

i) The Hanafi school

The Hanafi school of jurisprudence was established by the Persian imam Thabit Ibn al-Naoman, known as Imam Abu Hanifa (80–148 AH), who was born in the city of Kufa, present-day Iraq, and died in Baghdad.¹⁴⁷ He was very cautious in respect of the use of *ahadith* and accepted only strong *ahadith* that had been transmitted by a fully reliable chain of narrators and did not contradict the Qur'an or the purpose of *Shariah*.¹⁴⁸ He insisted that a *hadith* could be accepted only on the basis of strong evidence. For this reason, he relied heavily on the methods of analogical deduction (*qiyas*) and the jurist's personal opinion (*al-raa'y*),¹⁴⁹ in which jurists build their own opinion on a matter by investigating the signs or indications that can be found in the Qur'an to draw their conclusions from it.¹⁵⁰ According to

¹⁴⁵ Ibid.

¹⁴⁶ *Islamic Dictionary* op cit note 135.

¹⁴⁷ Muhammad al-Ghazali *Al-Sunnah al-Nabawiyah Beina Ahl al-Fiqh wa Ahl al-Hadith* (1989) 18.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Mohammed Hashim Kamali 'The approved and disapproved varieties of *ra'y* (personal opinion) in Islam' (1990) 7 (1) *American Journal of Islamic Social Sciences* 39–64.

Imam Abu Hanifa, both the methods of analogical deduction and the jurist's personal opinion had to be based on one of the purposes of *Shariah*.¹⁵¹

Although he left no written treatise on Islamic jurisprudence, his legacy was continued by his students, among them Abu Yussif and Imam Muhammad Ibn al-Hassan, whose own works continued to influence the further development of the Hanafi school.¹⁵²

ii) The Maliki school

The Maliki school is named after its founder Imam Malik bin Anas (93–179 AH), who was also known as the Imam of Medina.¹⁵³ He was the first Islamic scholar who wrote about the science of *hadith*, and thus became the leader of the school of *hadith*. He recorded the *ahadith* that he believed to be correct, but in so doing did not exclude the category of *hadith ahad*, accepting them as long as they did not contradict the Qur'an. As the author of the renowned '*al-Muwatta*', he wrote about both *hadith* and *fiqh*.¹⁵⁴

The sources used by the Maliki school of jurisprudence are the Qur'an, the *Sunnah*, the consensus (*ijma*) of the companions in Medina (*Ahl al-Medina*), analogical deductions (*qiyas*), the consideration of the public interest (*al-masalih al-mursalah*), the blocking of means (*sadd al-zara'i*), presumption of continuity (*al-istishab*) and the juristic preference (*al-istihsan*).¹⁵⁵

iii) The Shafei school

The Shafei school is named after Mohammed Bin Idris al-Shafei (150–204 AH), also known as Imam Ahl al-Sunnah.¹⁵⁶ The Shafei school took the middle position, between the school of Abu Hanifa that is based on the concept of *al-raa'y* (personal opinion) and the school of Imam Malik, based on *hadith*.¹⁵⁷

¹⁵¹ Osman al-Kamis 'Ma al-farq beina ahl al-ra'y wa ahl al-hadith' ['Fatwa answering the question: "What is the difference between the people of opinion and the people of *hadith*?"'], available at <http://www.almanhaj.com/vb/showthread.php?t=6431>, accessed on 11 June 2014; Idris Bashir *Al-Raa'y wa Atharoh fi al-Fiqh al-Islami* (2006) 11.

¹⁵² Ibid.

¹⁵³ Kamali op cit note 150.

¹⁵⁴ Forum of Islamic Jurisprudential Studies 'Al-mazaheb al-fiqhiyah al-arbaa', available at <http://www.ahlalheeth.com/vb/showthread.php?t=138694>, accessed on 20 May 2014.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

Imam Shafei relied on the method of personal opinion. This can be described as the ‘thorough exertion of a jurist's mental faculty in finding a solution to a legal question’.¹⁵⁸ He developed the science of Islamic jurisprudence (*usul al-fiqh*) that he described in his famous book, *Al-Resalah (The Message)*, considered to be the first written work on the science of Islamic jurisprudence (*usul al-fiqh*).¹⁵⁹ The sources of jurisprudence used by al-Shafei include the Qur’an, the *Sunnah*, the consensus of the companions of the Prophet¹⁶⁰ and analogical deductions.¹⁶¹

iv) The Hanbali school

The Hanbali school was founded by Ahmad Ibn Hanbal (164–241 AH) who dedicated his life to the study of *hadith* and *fiqh*. He was considered by many scholars as a scholar of *hadith* rather than of jurisprudence. Although one of his most renowned and influential teachers was Imam Shafei, he rejected Shafei’s teaching that focused on personal opinion because he considered the *hadith* to be more authoritative than personal opinion. He preferred to use even weak *ahadith* rather than analogical deductions.¹⁶²

The Hanbali jurisprudence is based on Ibn Hanbal’s method of elicitation (*istinbat*).¹⁶³ This, in the first instance, uses the text of the Qur’an and the *Sunnah*, secondly, the sayings of the companions and, thirdly, weak *ahadith*. Ibn Hanbal considered the *Sunnah*, including weak *ahadith*, as having the same authority as the Qur’an.¹⁶⁴

It is this use of weak *ahadith* that is responsible for several *hudud* prescriptions that have been developed by Islamic jurisprudence without any legal basis in the Qur’an and, even in contradiction to it. The death penalty for the crime of apostasy, for example, which has been endorsed by the Hanbali school of jurisprudence, is based on a *hadith ahad* that is not fully trustworthy and thus does not constitute sufficient justification for such a severe punishment. Using a weak *hadith* as the legal basis for the death penalty for apostasy is a severe violation of *Shariah*, especially as neither the Qur’an nor the correct *Sunnah* contains any evidence to support such a punishment for apostasy. In fact, quite the contrary is true, as *Shariah* endorses

¹⁵⁸ Intisar A Rabb ‘Ijtihad’ *Oxford Islamic Studies*, available at <http://www.oxfordislamicstudies.com/article/opr/t236/e0354>, accessed on 29 April 2016.

¹⁵⁹ Forum of Islamic Jurisprudential Studies op cit note 154.

¹⁶⁰ When the companions of the Prophet disagreed with each other, he used the saying that was in agreement with the Qur’an.

¹⁶¹ Forum of Islamic Jurisprudential Studies op cit note 154.

¹⁶² Ibid.

¹⁶³ Mohammad Zaini Yahaya, Muhammad Adib Samsudin & Hayatullah Lalulddin ‘An overview of the principles of jurisprudence vis-a-vis legal maxim’ (2014) 10 (2) *Asian Social Science* 157.

¹⁶⁴ Forum of Islamic Jurisprudential Studies op cit note 154.

freedom of religion.¹⁶⁵ The Qur'an states in Surah 2:256 that there is no compulsion in religion. This is just one of many examples where the provisions developed by Islamic jurisprudence contradict *Shariah* as presented in the Qur'an and the correct *Sunnah*.

The role of the *Sunnah*, more specifically, the use of weak and false *ahadith* and the difficulties in identifying whether or not a *hadith* can be considered fully reliable and correct, is one of the main reasons, why the wide field of Islamic jurisprudence is quite a controversial one.

(c) The current debate over Islamic jurisprudence

Many moderate Muslims view Islamic jurisprudence as being responsible for the clash of Islamic law with human right. One of the reasons for this view, as is described earlier, is the use of weak and false *ahadith* and the difficulties in identifying whether a *hadith* can be considered reliable or not. Another factor is that the rules and regulations developed by the *fuqaha* over the centuries reflect human opinions and interpretations and are, therefore, not infallible.

It is for these reasons that many moderate Muslims call for a filtering of the *Sunnah* and the provisions developed by Islamic jurisprudence in the light of *Shariah* to identify the correct *ahadith*, allowing them to stand along with the Qur'an as a main source of Islamic jurisprudence. Gamal al-Banna, for example, calls for a filtering of the *Sunnah*. He stresses that the Qur'an is the first source of legislation and criticises Islamic jurisprudence for having wrongly elevated the *Sunnah* to be the first source of legislation over and above the Qur'an.¹⁶⁶ According to al-Banna, *hadith* have to be in full agreement with the Qur'an in order to be accepted as correct.¹⁶⁷ He, therefore, recognises the *Sunnah* as the record of the Prophet Muhammad's words and deeds only as far as they have been guided by the Qur'an. Al-Banna calls for the use of independent legal reasoning (*ijtihad*) and the principles of logic and personal opinion (*al-raa'y*), and praises the Hanafi school for its use of *al-raa'y*.¹⁶⁸

Taha Jaber al-Alwani is another moderate Muslim who calls for the *Sunnah* to be filtered by amending the elements of *fiqh* that contradict the Qur'an, although his view is somewhat different from that of mainstream moderate Muslims who see *fiqh* as the source of the problem. Al-Alwani sees a need for *fiqh*, as he believes that the *Sunnah* is necessary for a

¹⁶⁵ Surah 2:256.

¹⁶⁶ Gamal al-Banna *Qadiyat al-Fiqh al-Jadid* (2004) 170.

¹⁶⁷ Al-Banna op cit note 129.

¹⁶⁸ Al-Gharbawi op cit note 14 at 17.

correct interpretation of the Qur'an.¹⁶⁹ He points to Surah 59:7: 'So take what the Messenger assigns to you, and deny yourselves that which he withholds from you', and Surah 4:80: 'He who obeys the Messenger, obeys Allah.' He sees these two verses as proof of the need for the *Sunnah*. He explains that the Qur'an can be correctly interpreted if such interpretation is based either on an explanation of the qur'anic text or on examples of an early practice of one of the qur'anic principles found in the *Sunnah*.¹⁷⁰

The approach of al-Banna and al-Alwani is sound, as it is in agreement with the Qur'an and with the teachings of the Prophet who warned against the spreading of any wrong information about him: 'Do not tell a lie against me, for whoever tells a lie against me, then he will surely enter the Hell-fire.'¹⁷¹

Some moderate Muslims go even further in their criticism of *fiqh*, rejecting it completely as they do not see any need for it. They believe that the Qur'an and the *Sunnah* explain all things sufficiently. Former Al-Azhar professor Ahmed Subhy Mansour is one of the scholars who reject *fiqh* utterly.¹⁷² He even argues that there is no need for the *Sunnah*. He sees the Qur'an as the sufficient and only source, and he rejects all supplementary sources as a corruption of the Word of God.¹⁷³ This is what he understands from Surah 16:89 that declares: 'We have sent down to thee the Book explaining all things.' Mansour points out that the Qur'an has been revealed in a way that deals with all things, and therefore he sees no need for any other source.¹⁷⁴ He also rejects Islamic jurisprudence altogether, calling it a fanatical Wahabi legislation, and instead promotes the acceptance of the Universal Declaration of Human Rights:

We want to convince the Islamic world to accept the Universal Declaration of Human Rights as Islamic laws, according to the real core of Islam. By doing so, these resolutions could be the main source of legislation in Muslim countries instead of Islamic jurisprudence, which actually means fanatical Wahabi legislations.¹⁷⁵

¹⁶⁹ Al-Alwani op cit note 79.

¹⁷⁰ Ibid.

¹⁷¹ *Sahih al-Bukhari* vol 1 at 3 *hadith* 106.

¹⁷² Founder and leader of the Islamic Movement 'Ahl al-Quran'; which is very well known in the Middle East, see <http://www.ahl-alquran.com>.

¹⁷³ Ahmed Subhi Mansour *Al-Qur'an wa Kafa Masdar lel Tashriyah al-Islami* (2005) 34.

¹⁷⁴ Ibid.

¹⁷⁵ Ahmed Subhi Mansour 'Human rights need to be Islamic Law', available at http://www.ahl-alquran.com/English/show_article.php?main_id=11794, accessed on 29 June 2014.

Such a complete rejection of the *Sunnah*, however, is very likely to be completely rejected by the vast majority of the Muslim community, and can thus foster division and hinder efforts that support reformation.¹⁷⁶

Orthodox Muslim scholars, of course, defend the inherited rules and regulations of Islamic jurisprudence, since they believe that they have become part of *Shariah*.¹⁷⁷ They actually consider the moderate Muslims' call for reformation an assault upon *Shariah* as the God-given divine order, and therefore an assault upon Allah Himself.

El-Shahat Mansour is one of the orthodox voices who defends Islamic jurisprudence as perfect and divine — he praises all the theories and rulings developed by the scholars, as a lighthouse to light the way for all who do research concerning private and public law.¹⁷⁸ He believes that Islamic jurisprudence is fulfilling the public need perfectly, and praises it for leaving no question without an answer.¹⁷⁹ He believes that any problem or issue experienced today is addressed in Islamic jurisprudence, and that there is no branch of law that Islamic jurisprudence does not cover. He supports his view with Surah 17:12 that states: '[A]ll things have We explained in detail.'¹⁸⁰

El-Shahat Mansour, seems to ignore the fact that there are many current issues in the current society of the twenty-first century that have not yet been resolved by Islamic law. Today's society is overwhelmingly different from that of the seventh century, even if only technological developments and scientific achievements are considered. Islamic jurisprudence has to respond to the new questions and challenges of today that did not exist in the seventh century.¹⁸¹

Mansour also seems to ignore that many of the stipulations developed by Islamic jurists do not necessarily suit all times and circumstances. Islamic jurisprudence of the time of the Prophet and his four successors has interpreted the Qur'an with a seventh-century way of life in mind and in the context of the specific culture and environment of Islamic society at that time. It is illogical, therefore, to apply the same kind of jurisprudence today in the twenty-first century, with its completely different environment. It is apparent, thus, that a new reading of the Qur'an from the perspective of the twenty-first century is necessary. The widespread and

¹⁷⁶ Fahmi Howeidi 'Hamlat tafkik al-Islam' *Al-Ahram* (March 2005) 43212, Cairo, available at <http://www.ahram.org.eg/Archive/2005/3/29/OPIN1.HTM>, accessed on 18 September 2015.

¹⁷⁷ Manarat (Official Islamic Website) 'Fiqh wa Shariah' 13 June 2014, available at <http://www.manaratweb.com/اول شري عتل فق>, accessed on 24 October 2014

¹⁷⁸ Mansour op cit note 78.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Al-Qaradawi op cit note 36 at 101.

common acceptance of the importance of the protection of human rights, as well as the fact that most Muslim countries have become signatories of international human rights laws, is just one of the new developments that have to be taken into consideration.

In the light of the tremendous differences between the society of the seventh century and that of today's world, the pronouncements of the early scholars cannot be accepted as fitting for all times, and as absolutely infallible and divine. This important conclusion should be kept in mind in the following discussion of Islamic criminal law, and particularly the very controversial area of *hudud* ordinances as the main focus of this research.

IV Islamic law

As mentioned earlier, Islamic law — in contrast to *Shariah* — includes not only the collection of rules and regulations presented in the Qur'an and the correct *Sunnah*, as the divinely assigned prescriptions, but also those that have been developed by the human understanding of the *fuqaha* throughout the centuries.¹⁸² Hence, whilst *Shariah* can be described as fully divine, Islamic law contains both divine stipulation and that that cannot be considered divine. What has been written in the Qur'an or the *Sunnah* without any interference from the jurists' personal opinions — for example, the religious duties of prayer, charity or fasting, which are part of the *fiqh* of *ebadat*¹⁸³ — reflect *Shariah* and can be considered divine.¹⁸⁴ By contrast, the elements of Islamic law that contain personal opinions of the Islamic jurists, especially in discussing secondary issues, cannot be considered divine. For example, before a Muslim goes to prayer he or she has to practice the ritual of 'washing'. This is mentioned in the Qur'an in Surah 5:6. The Qur'an, however, does not give any detailed descriptions of *how* the ritual should be practised. The Muslim jurists, therefore, had to come up with their own interpretations and explanations. So the concept of washing itself is seen as divine, but *how* it is done cannot be considered completely divine, as it is based on human and differing jurists' opinions. For example, the Muslim jurists disagree about how and how much hair should be

¹⁸² Berwal op cit note 61.

¹⁸³ *Fiqh al-ebadat* is the jurisprudence dealing with all the rules and regulations concerning the Islamic concept of worship, including all related areas, such as purity, prayer, zakat, fasting, pilgrimage and other religious rituals and practices.

Fiqh al-muamalat, by contrast, refers to three areas of law, namely Islamic criminal law, family law and commercial law, which includes all the rules and regulations concerning finances, banking, investment, trades and other social and economic matters.

¹⁸⁴ Al-Asqar op cit note 72 at 16.

washed — just the front part or the full head.¹⁸⁵ Islamic law can thus be considered to contain both divine elements, and those that are not divine.

The following section will focus on what is the core of this study, namely, Islamic criminal law, especially the *hudud* ordinances. The section aims to identify those pronouncements of Islamic law pertinent to *hudud* ordinances that cannot be considered divine, for they are based on human opinions and interpretations. The result of this exploration will be the basis of a re-interpretation and reformation of the identified pronouncements to be undertaken in Chapter 6.

(a) Islamic criminal law

In Islamic criminal law the general definition of a crime is any act that is forbidden by *Shariah* and for which Allah has ordained a punishment.¹⁸⁶ A crime can be committed either by doing what is prohibited or by omitting to do what has been commanded.¹⁸⁷ For an act to be considered a crime, the offender has to be an adult and responsible for his action.¹⁸⁸ The Islamic jurists have introduced a common principle in Islamic criminal law called '*la jaremah wa la uqubah bila naas*' that translates as 'no crime nor punishment without text'. This principle is usually understood to mean 'no crime without punishment being assigned'.¹⁸⁹ This leads to the crucial conclusion that *Shariah* has the final word concerning what can be considered to be a crime and which punishment should be applied.

Islamic criminal law distinguishes three categories of crimes, namely, *qisas*, *ta'zir* and *hudud*.

i) *Qisas* (retribution)

The crime of *qisas* (retribution) is concerned with the physical assault upon a person, such as homicide, infliction of wounds and battery.¹⁹⁰ The punishment prescribed by the Qur'an is a penalty according to the law of equality. This means if someone cuts off a part of the body of someone else, for example, his ear or hand, he has to be punished by the same harm or injury

¹⁸⁵ Berwal op cit note 61.

¹⁸⁶ Abu al-Hasan Ali al-Mawerdy *Al-Ahkam al-Sultaniyah* (1989) 192; Abdul Qadir Audah *Al-Tashieriat al-Jinai al-Islami Muqaranan bil qanun al-Wadai* (2011) vol 1 at 634.

¹⁸⁷ Al-Mawerdy op cit note 186; Audah op cit note 186.

¹⁸⁸ Ibid at 10–11.

¹⁸⁹ Ibid at 634.

¹⁹⁰ Farhat J Ziadeh 'Criminal law' *The Oxford Encyclopedia of the Islamic World*, available at <http://www.oxfordislamicstudies.com/article/opr/t236/e0170>, accessed on 24 October 2014; Abdul Rahman al-Jaziri *Al-Fiqh ala al-Mazaheb al-Arbaa* 2 ed (2003) vol 5 at 12–13.

that he committed against the individual, for example, if the offender kills a person, he has to be killed.¹⁹¹ Since a *qisas* crime is not considered a crime against Allah, it can, however, be forgiven or waived by the payment of compensation or blood money. The final decision on the form of punishment is up to the family of the victim. Since according to the law of equality, the punishment for *qisas* crimes is retribution, the punishments are usually not perceived as being exaggerated. The crime and punishment of *qisas*, as well as the option of compensation, is mentioned in the Qur'an in Surah 5:45 and Surah 2:178–9.¹⁹²

ii) *Ta'zir* (crimes with discretionary punishment)

Ta'zir does not refer to a specific crime and has no fixed punishment. It includes all kinds of crimes that have no specific punishments prescribed for them, for example, eating the meat of a dead animal,¹⁹³ taking interest (*riba*) or failing to respect *Ramadan*. Three different categories of crimes can be distinguished namely, *ma'asi* (sin), those against public interest (*jara'im did al-maslaha al-a'mah*) and those violating the Islamic religious duties (*mukhalafat*).

The punishment for *ta'zir* crimes is discretionary. It is up to the *imam* or the judge to choose any form of punishment that serves the purpose of deterrence, which is what *ta'zir* means. The punishment can be, for example, a beating, imprisonment or admonition.¹⁹⁴ Muslim scholars disagree as to the nature and the limits of the punishment. The Hanafi school of jurisprudence declares that the punishment of *ta'zir* should not exceed ten lashes, while the Maliki school view is that, for the purpose of deterrence, a judge can order that the convicted criminal be beaten with even more than 100 lashes, as long as the whipping does not result in the death of the offender. Other scholars, including Hanbali scholars, believe that the punishment of *ta'zir* can even include the death penalty, including crucifixion.¹⁹⁵ Although the focus of this thesis is the reformation of Islamic criminal law, *ta'zir* crimes will not be

¹⁹¹ Al-Jaziri op cit note 190 vol 5 at 217.

¹⁹² Ibid at 219.

Surah 5:45 '... Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.'

Surah 2:178–9 '... the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude....'

¹⁹³ That have not been slaughtered for the purpose to be eaten, but that have died either a natural death or that have for example been killed in an accident or by another animal.

¹⁹⁴ Al-Jaziri op cit note 190 vol 5 at 219.

¹⁹⁵ Ibid.

discussed, since they, like *qisas*, are not considered crimes against Allah, and the punishments meted out for them are not fixed, and can be forgiven or compensated for.

iii) *Hudud* (contravention of the limits set by Allah)

Hudud crimes can be described as transgressions of the limits set by Allah.¹⁹⁶ The term *hudud* (singular *hadd*) refers to the limit between what is permissible (*halal*) and what is prohibited (*haram*).¹⁹⁷ In contradiction to this definition, however, *hudud* crimes are usually claimed to refer to crimes with specific, fixed punishments. They are believed to concern the rights of Allah and, consequently, it is argued that they cannot be compromised or forgiven by anyone other than Allah.¹⁹⁸ This widespread understanding of *hudud* as fixed punishments that cannot be questioned or forgiven is based on the use of *hudud* as punishment — a crucial issue that will be further discussed and refuted later in this chapter.

The *Oxford Encyclopaedia* lists six specific crimes (and their prescribed punishments) in its definition of *hadd*, namely ‘theft (amputation of the hand), illicit sexual relations (death by stoning or 100 lashes), making unproven accusations of illicit sex (80 lashes), drinking intoxicants (80 lashes), apostasy (death or banishment), and highway robbery (death)’.¹⁹⁹ This reflects the common (mis)understanding that there is a specific number of *hudud* crimes with specific divinely prescribed punishments that together form a fixed set of infallible and mandatory ‘*hudud* ordinances’.

The category of *hudud* crimes is therefore the main challenge to any attempt to reconcile Islamic criminal law with human rights. Since its punishments are considered to be fixed and mandatory, any attempt to amend or reform any element of this set of *hudud* ordinances is viewed as an assault upon Allah.

The aforementioned widespread understanding of *hudud* ordinances, however, is based on several misconceptions that will be further discussed and clarified in the following section.

(b) *Hudud* ordinances

The afore described understanding of *hudud* ordinances as a fixed set of divinely prescribed and mandatory punishments that cannot be compromised nor negotiated since they concern

¹⁹⁶ Ibid at 11.

¹⁹⁷ Sayed Sabeq *Fiqh al-Sunnah* 5 ed (1971) vol 2 at 355.

¹⁹⁸ Qaderi op cit note 73.

¹⁹⁹ *The Oxford Dictionary of Islam*, available at <http://www.oxfordislamicstudies.com/article/opr/t125/e757>, accessed on 24 October 2014.

the right of Allah, does not reflect the qur'anic teaching, as will be demonstrated in this section. The said definition implicates three premises that this chapter will refute:

1. The set of *hudud* ordinances consists of a specific number of divinely prescribed crimes and their punishments.
2. The term *hadd* refers to 'punishment', more specifically, to the punishment for crimes against the rights of God.
3. The *hudud* punishments are divinely prescribed.

If the above three premises were all fully correct, then it could indeed be concluded that the harsh punishments for *hudud* crimes, including the death penalty for apostasy and stoning for adultery, are prescribed by Allah and are thus divine and non-negotiable. If, on the other hand, as this chapter will show, they are not all fully correct, then it can be reasonably argued that that it is consequently legitimate to question and examine the set of *hudud* ordinances and to investigate ways to amend the punishments. This thesis actually argues that it is not only legitimate but even necessary and beneficial, to critically examine the set of *hudud* ordinances to identify the elements that can indeed be considered divinely prescribed and those that cannot. In the following section, these premises will be discussed in greater depth.

i) The notion of the set of a fixed number of crimes

The premise that *hudud* ordinances consist of a set of a specific number of crimes and their punishments can be refuted on the grounds that there is not one specific number of crimes that all Islamic scholars agree on. The comparison of the teaching and practice of *hudud* ordinances in the four main Sunni schools of jurisprudence, to be undertaken in Chapter 4, will show that they do not all share the same understanding and definitions. The Hanafi school holds to five *hudud* crimes, the Shafei school to seven, the Maliki school to eight, whilst amongst the Hanbali scholars different views are found, with some holding to seven crimes, others to only five. The fact that there are many differences in the views of the different schools of jurisprudence concerning the exact number of crimes that are considered to be part of the set of *hudud*, disproves the notion of a specific number of clearly divinely assigned crimes and their punishments.

The set of crimes and punishments proclaimed as *hudud* ordinances is not mentioned in the Qur'an or the correct *Sunnah*. It can even be considered as contradicting *Shariah*, since the

correct *Sunnah* provides a list of seven crimes that are described as the worst sins, or the seven ‘destroyers’,²⁰⁰ that does not reflect the list of *hudud* ordinances.²⁰¹

ii) The debated meaning of the term *hudud* (sing. *hadd*)

The second of the three aforelisted premises is that the term *hadd* refers to ‘punishment’, more specifically, to the punishment for crimes against the rights of God.

It is noteworthy that the term *hudud* (or *hadd*) is generally used very ambiguously — sometimes it is used as referring to crimes, at other times referring to punishments. Even amongst Islamic scholars this is a much-debated issue. Interestingly, even the *Oxford Encyclopaedia of the Islamic World* contradicts itself on that matter. In its description of Islamic criminal law, more specifically the three categories of wrongs ‘that are punishable by the state with the object of deterrence’, the *Encyclopaedia* explains *hudud* as being ‘wrongs the contravention of which leads to a prescribed and mandatory²⁰² penalty’.²⁰³ Here *hudud* are described as crimes. In its definition of *hadd*, however, the *Encyclopaedia* contradicts itself by describing it not as crime but as punishment, namely ‘[a] punishment fixed in the *Quran* and *hadith* for crimes considered to be against the rights of God’. This is just one example of the ambiguous use of the term *hadd* (or *hudud*).

Despite this confusion, the claim that the term *hudud* refers to punishments can be refuted easily. The meaning of the term *hadd* in the Arabic language is ‘limit’ or ‘boundary’. A second meaning given by the Arabic dictionary is ‘prohibition’.²⁰⁴ The Qur'an confirms this meaning. The qur'anic verses that contain the term *hudud* are drawing the line (limit) between right and wrong, thus identifying what is permissible and what can be considered a crime. The term *hudud* is repeated 14 times in the Qur'an. In 13 out of the 14 verses, the term *hudud* is used in the sense of limits set by Allah, thereby identifying what is permissible (*halal*) and what is prohibited (*haram*). Once, namely, in Surah 9:97, the term *hudud* is used in the

²⁰⁰ The seven ‘worst sins’ listed in the *hadith* are: ‘Associating others with Allah (*Shirk*); witchcraft; killing a soul whom Allah has forbidden us to kill, except for a right that is due; consuming orphans' wealth; consuming *Ribā*; fleeing from the battlefield; and slandering chaste, innocent women.’ *Sahih Muslim* (2007) vol 1 at 177 *hadith* 262.

²⁰¹ Only two of the seven crimes listed as the seven ‘worst sins’ match the list of *hudud* ordinances, namely ‘defamation of chaste women’ and apostasy.

²⁰² The idea of prescribed and mandatory punishment results from the common understanding that *hudud* crimes are crimes against the rights of Allah.

²⁰³ Farhat J Ziadeh op cit note 190.

²⁰⁴ Ibn Manzur *Lisan Al-Arab* (2008).

meaning of the ‘command’ of Allah.²⁰⁵ Remarkably, the Qur'an never uses the term *hadd* or *hudud* in reference to punishment. (The qur'anic terms used for punishment are *jaza'* or '*azab* — not *hadd*.) The qur'anic verses that use the term *hudud* usually call on Muslims to keep the limits set by Allah and explain that whoever keeps these limits will be admitted to paradise, whilst whoever transgresses them will end in hell. For example:

Those are limits set by Allah: those who obey Allah and His Messenger will be admitted to Gardens with rivers flowing beneath, to abide therein (forever) and that will be the supreme achievement. But those who disobey Allah and His Messenger and transgress His limits will be admitted to a fire, to abide therein: And they shall have a humiliating punishment. (Surah 4:13–14)

Those that ... enjoin good and forbid evil; and observe the limits [*hudud*] set by Allah. (These do rejoice). ... (Surah 9:112)

[S]eek what Allah hath ordained for you... .Those are limits (set by) Allah. Approach not nigh thereto. Thus doth Allah make clear His Signs to men: that they may learn self-restraint. (Surah 2:187)

Those are limits set by Allah. And any who transgresses the limits of Allah, does verily wrong his (own) soul. (Surah 65:1)

Now these are the bounds set by God; and grievous suffering [in the life to come] awaits all who deny the truth.' (Surah 58:4 Asad translation)

It is important to note that these verses say that those who transgress the limits set by Allah do harm to their own soul and they will be held accountable after death. There is no mention of a punishment during this lifetime. The qur'anic interpreters Ibn Kathir²⁰⁶ and al-Razi²⁰⁷ stress this aspect, pointing out that Allah will personally hold people who transgress His limits accountable in the afterlife, thus denying the need for punishment during this lifetime. Ergo, the Qur'an does not support the widespread understanding of *hudud* as punishment.

The *Sunnah* confirms the meaning of *hadd* as referring to the 'crime'. One *hadith* reports, for example, of a man who came to the Prophet and confessed that he had committed a *hadd* for which he wanted to be punished. When the Prophet heard that the man had joined the prayer, he told him that Allah had forgiven his *hadd*'.²⁰⁸ The *hadith* uses the term *hadd* in a

²⁰⁵ Surah 9:97 (Picktall) 'The wandering Arabs are more hard in disbelief and hypocrisy, and more likely to be ignorant of the limits [*hudud*] which Allah hath revealed unto His Messenger. And Allah is knower, Wise.'

²⁰⁶ *Tafsir Ibn Kathir* (2002) vol 8 at 143.

²⁰⁷ Abu Abdullah Muhammad Ibn Umar al-Razi *Al-Tafsir al-Kabir* (2004) 30.

²⁰⁸ Anas Ibn Maalik said: 'I was with the Prophet, pbuh, when a man came and said: 'O Messenger of Allah, I have committed a *hadd* and want you to enforce its punishment on me. He [the Prophet] did not ask about it. He [Anas] attended the prayer and prayed with the Prophet, pbuh. When he [the Prophet], pbuh, did the prayer, he [the man] said: 'O Messenger of Allah I have committed a *hadd* of the Book of Allah. The Prophet said: Did you pray with us? He [the man] said yes. He [the Prophet] said: God has forgiven your *hadd*.'

Sahih al-Bukhari vol 8 at 426 *hadith* 6437. This *hadith* is narrated by both Bukhari and Muslim. See also Muhammad al-Shawkani *Nail al-Autar* (1993).

way that clearly refers to crime. This is just one of several similar examples that use the term *hadd* as clearly referring to the crime.

By contrast, the *ahadith* that are used to support the claim that the term *hadd* can be used for punishment, are quite weak and do not provide sufficient evidence to prove that claim. The most famous *hadith* used to this end is one narrated by Abdullah and recorded in al-Bukhari that quotes the Prophet as follows:

Allah's Apostle said, 'The blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Apostle, cannot be shed except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one who reverts from Islam (apostate) and leaves the Muslims.'²⁰⁹

This *hadith* is a weak one, as it has a number of problems, both with the chain of narrators (*isnad*) as well as with its text (*matn*). The main problem of the *hadith*, however, does not lie with the text: far more troubling is the fact that most of the narrators who are links in the chain of narrators (*isnad*) are not considered reliable.²¹⁰ Regardless of whether this *hadith* is a weak one, it is hard to understand how it can support the claim that the term *hadd* refers to punishment. The *hadith* does not provide convincing evidence to support that claim.

Another famous *hadith*, often used to justify the meaning of punishment, is one that is used to defend the death penalty for apostasy. It declares 'whoever changes his religion kill him'. This *hadith* does not use the term *hadd* or *hudud* at all. It is not understandable, therefore, how it possibly can be argued this *hadith* can support the use of *hadd* as punishment. Besides, the *hadith* is also weak, as its narrator Ikrimah was accused of lying by Ibn Omar, Saeed Ibn Jubayr and Anas Ibn Malik.²¹¹

As can be seen from the above examples, there is little convincing evidence to support the claim that the term *hadd* can be used for punishment, since all the *ahadith* used for this purpose are weak.

Nevertheless, the understanding of *hadd* as punishment is very widespread, as can be seen, for example, in some English *hadith* translations, which often translate the Arabic term

²⁰⁹ *Sahih al-Bukhari* vol 9 bk 83 *hadith* 17 narrated by Abdullah; Taha Jaber al-Alwani *Ishkaliyat al-Riddah wal Murtadin min Sadir al-Islam ela al-Yum* (2006) 193.

²¹⁰ The reliability of the first narrator, Abi Bakr Ibn Sheyba who died in 220 AH, was questioned by the early scholars al-Hakim and Abu Bakr Ibn Abi Dawud. Ibn Haban also said that Ibn Sheyba might be mistaken as regards this *hadith*. The second person in this chain, Hafs Ibn Gheath, who died in 194 AH, was accused by Abu Sarrah of having a bad memory, while Abu Dawud Ibn Rashid said of him that he was often mistaken. The third narrator, Abu Muawiyah al-Darir, was characterised by al-Hakim as being an extremist, even though Bukhari and Muslim referred to him. Ibn Maijn even said of al-Darir that he narrated false *ahadith*. The fourth narrator, Wakiyah, was described by Ibn al-Maddani as often being mistaken. The fifth narrator, al-Aamesh, who died in 148 AH, was accused by al-Zahabi and al-Hakim al-Nisabori of committing fraud, and the last narrator, Masruk, was described by Abu Hatim as weak. Ahmed Subhy Mansour 'Apostasy' *Ahl al-Quran*, available at http://www.ahl-alquran.com/arabic/book_main.php?main_id=35, accessed on 28 September 2014.

²¹¹ Al-Alwani op cit note 209 at 170.

‘*hadd*’ as ‘*hadd* punishment’ as can be seen for example in the following English translation: ‘No one should be given more than ten lashes except in the case of one of the *hadd* punishments prescribed by Allah.’²¹²

When the above *hadith* is read in Arabic, it is very clear that the word *hadd* is synonymous with ‘crime’, just as it is in other *ahadith*. This example shows how widespread the (mis)interpretation of the term *hadd* as punishment is, and how misleadingly it is communicated.

As mentioned before, even Muslim scholars are engaged in a major debate as to the question of whether the term *hudud* refers only to the crimes and the line between what is permissible and what is prohibited, or whether it also refers to the punishment. Several Muslim scholars, including Ibn al-Athir and Sheikh Yusuf al-Qaradawi,²¹³ state clearly that the term *hudud* refers only to a crime. Al-Zajaj, a scholar of Arabic language, points out that the root of the word *hadd* in Arabic is ‘prohibition’ and suggests, therefore, that ‘*al-hudud* are the crimes that Allah prohibited and that no one should commit’.²¹⁴ Other scholars, including Imam Shawkani,²¹⁵ Ibn al-Jauzy,²¹⁶ and Sheikh Sayed Sabeq,²¹⁷ support the interpretations of the term *hudud* as meaning both crime and punishment. Shawkani claims that Surah 2:187 gives proof of its meaning as ‘crimes’.²¹⁸ He also defines *hadd* as a specified punishment designed for violations of the rights of Allah.²¹⁹ Ibn al-Jauzy describes *hudud* as referring to the limit between right and wrong and a set of punishments.²²⁰ Sheikh Sayed Sabeq stresses the meaning of *hudud* as ‘a set of punishments for certain kinds of crimes that have been established to prevent that the crimes will be committed again’.²²¹ Abdul Qadir Audah, on the

²¹² *Sahih Muslim* English translation by Nasiruddin al-Khattab (2007) vol 4 at 485 *hadith* 4460.

Another example occurs in a *hadith* that mentions the case of the Makhzūm woman who had committed theft. The English translation of the *hadith* speaks about ‘*hadd* punishment’, whereas the Arabic text of the *hadith* uses the term *hadd* when it quotes the Messenger of Allah who said: ‘Are you interceding about one of the *hadd* punishments of Allah?’ *Sahih Muslim* vol 4 at 459 *hadith* 4411.

²¹³ Yusuf al-Qaradawi ‘*Al-hudud fi al-ghetab al-fiqhi al-muaser*’ *Al-Jazeera TV* 1 April 2011 *Sharia and Life Program*, available at <http://www.aljazeera.net/programs/pages/1033246e-121f-4e87-927b-8116d8b9e544>, accessed on 20 June 2014.

²¹⁴ Ibn al-Jauzy *Zad al-Masir* (2004) vol 1 at 193.

²¹⁵ Al-Shawkani op cit note 208 vol 7 at 250.

²¹⁶ Al-Jauzy op cit note 214 at vol 1 at 135.

²¹⁷ Sabeq op cit note 197 at 110.

²¹⁸ Al-Shawkani op cit note 208 vol 7 at 250.

²¹⁹ Al-Shawkani said that the ‘*hadd* is the punishment that is specified for the rights of Allah’. Al-Shawkani op cit 208 vol 7 at 132.

²²⁰ Al-Jauzy op cit note 214.

²²¹ Sayed Sabeq *Fiqh al-Sunnah* 5 ed (1971) vol 2 at 110.

other hand, favours the definition of *hadd* as a punishment specified by Allah, namely that it is one that no one has the authority to change, as the punishment is Allah's right.²²²

However, if all the above information is taken into consideration it can be seen that neither the meaning of the term *hudud* in the Arabic language, nor its use in the Qur'an or the correct *Sunnah* can justify its use as referring to punishments. The aforementioned premise that the term *hudud* refers to 'punishments', more specifically, to the punishment for crimes against the rights of God has thus been refuted.

i) *Hudud* punishments and their legitimation in the Qur'an or *Sunnah*

The claim that all the punishments assigned for *hudud* crimes are divinely prescribed and thus holy, perfect and not negotiable can easily be refuted by examining each one of the six *hudud* crimes and their supposedly divinely prescribed punishment. A comparison of the widespread interpretations of Islamic jurists with the primary sources of *Shariah* reveals interesting contradictions.

1. Apostasy (*al-riddah*)

The traditional definition of apostasy (*al-riddah*), for example, is 'leaving Islam willingly by saying or doubt or deed'.²²³ The orthodox Muslim scholar Sheikh Muhammad bin Abdul Wahab has presented a definition of apostasy that is even wider than the aforementioned one, including, for example, failing to consider non-Muslims as infidels, considering any other guideline or judgment besides those of the Prophet, or disliking any of the Prophet's teachings.²²⁴

²²² Audah op cit note 186 at 78–9.

²²³ Imad Ali Jumah *Al-Mulakhasat al-Fiqhiyyah al-Mujazara* (2004).

A person can be convicted of having committed the crime of apostasy either by 'saying', for example by insulting Allah or His Messenger or His angels or by demonstrating disbelief, for example by 'denying' any of the basic teachings of Islam, or by 'deeds', for example by bowing down to an idol or by putting the Qur'an on the floor or in a dirty place.

²²⁴ Sheikh Muhammad Bin Abdul Wahab issued a *fatwa* concerning the definition of apostasy when he was asked whether a Muslim who confesses the *Shahada* (Islamic creed) and professes his prayers and fasting, but behaves in a way that contradicts the *Shahada* by continuously committing sin, will still be considered as Muslim or rather as infidel. In his *fatwa* Abdul Wahab explained that there are ten things that will cause a Muslim to be considered apostate: if he does not believe that Allah is the only God, if he welcomes the idea of a mediator between Allah and the people as an advocate before God, if he does not to consider non-Muslims as infidels, if he considers any other guideline or judgment besides those of the Prophet, if he dislikes any of the Prophet's teachings, if he mocks anything concerning Islam, if he professes magic, if he associates with non-Muslims and assists them, if he believes it is not necessary to follow the Prophet or if he compromises the religion of Allah. Abdul Wahab op cit note 50, vol 1 at 5 (10–91).

The punishment for apostasy assigned by Islamic jurisprudence is the death penalty by beheading.²²⁵ The apostate is given only three days to repent and to return to Islam.²²⁶ If the apostate does not repent within these three days, he or she will be sentenced to death by beheading before the sunset of the third day.²²⁷

The Qur'an mentions the crime of apostasy in Surah 2:217, and declares that if anyone leaves Islam ('turns back from their faith') and dies in unbelief, his life will bear no fruit and he will end in hell ('they will be companions of the Fire and will abide therein').²²⁸ Hence, the verse points to a punishment in the afterlife, but no mention is made of any punishment for the crime during this lifetime.

Also, in the correct *Sunnah* there is no evidence to support a punishment for apostasy during this lifetime.²²⁹ The al-Azhar scholar Ahmed Subhy Mansour confirms that there 'is no punishment for apostasy in the Qur'an'.²³⁰ The *ahadith* used to justify the use of the death penalty for apostasy are all weak.²³¹ The most famous of these is the one that declares 'whoever change[s] his religion, kill him'.²³² As previously mentioned, this is a weak *hadith* that cannot be considered as sufficient justification for the death penalty, particularly since the Qur'an promotes religious freedom in Surah 2:256.²³³

As can be seen from the above, neither the Qur'an nor the correct *Sunnah* prescribes any punishment during this lifetime for the act of apostasy. The punishment assigned by Islamic jurisprudence is based on weak *ahadith* and reflects human interpretations and opinions and can therefore not be considered as divine or infallible.

2. Adultery (*zina*)

The crime of adultery (*zina*) is traditionally defined as 'sexual intercourse of a man with a woman who is not his wife, or sexual intercourse of a woman with a man who is not her

²²⁵ Al-Jaziri op cit note 190 vol 5 at 372.

²²⁶ Ibid.

²²⁷ Abdul Wahab op cit note 50 vol 1 at 5 (10–91).

²²⁸ Surah 2:217 'And if any of you Turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the Fire and will abide therein.'

²²⁹ Al-Alwani op cit note 209 at 170.

²³⁰ Ahmed Subhy Mansour 'Hadd al-Ridha al-Mazaum', available at http://www.aahl-alquran.com/arabic/book_main.php?main_id=35, accessed on 1 July 2014.

²³¹ Suhaib Mustafa Aamedy 'Jaremat al-Redah wa uqubat al-mutad fi al-fiker al-Islami al- Muasser' 2 September 2015, available at http://alhiwarmagazine.blogspot.com/2015/09/blog-post_92.html, accessed on 10 August 2016.

²³² Al-Alwani op cit note 209 at 170.

²³³ Surah 2:256 'Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things.'

husband'.²³⁴ The punishment for adultery according to Islamic jurisprudence differentiates between two categories: free persons and slaves. As far as free persons are concerned, Islamic jurisprudence furthermore differentiates between married and unmarried persons. The punishment for a free married person is stoning to death, while the punishment for an unmarried person is flogging with 100 lashes and one year in exile. The punishment for a slave is a beating with 50 lashes. For Jews or Christians (*Zimmi*),²³⁵ the punishment is always death by stoning.²³⁶ The Qur'an mentions the crime of adultery in Surah 17:32: 'Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).' The punishment assigned by the Qur'an is flogging with 100 lashes.²³⁷ Notably, the Qur'an does not distinguish between married or unmarried persons. Further, stoning to death or exile is not mentioned in the Qur'an or in the correct *Sunnah*. Consequently, the punishment for flogging can be seen as being prescribed by Allah, but the punishment of stoning to death and exile for one year cannot be considered divinely assigned.

3. Defamation (*qazf*)

The traditional definition of defamation (*qazf*) is 'falsely accusing someone of having committed adultery or homosexuality or denying the sonship or daughtership of someone'.²³⁸ The punishment prescribed by Islamic jurisprudence is a beating with 80 lashes if the victim were a free person, and with 40 lashes if the victim were a slave.²³⁹ The punishment of flogging with 80 lashes can be found in the Qur'an in Surah 24:4.²⁴⁰

²³⁴ Ibn Hajar al-Asqalani op cit note 556.

Concerning the required evidence to convict the suspect, Islamic jurisprudence says that the suspect must be convicted with no doubt either by personal confession four times repeated or through four male witnesses or by pregnancy.

According to the traditional definition of adultery, 'having sex with an animal' is not considered to be *hadd*, but a *ta'zir* crime. The decision on the punishment for *ta'zir* is up to the judge. It can be time in jail or a blow across his face or it can be rebuked publicly or can be death by stoning. Jumah op cit note 223 at 139.

²³⁵ *Zimmi* = Jews or Christians (often referred to as 'dhimmi', but in Arabic it is pronounced as 'z').

²³⁶ Jumah op cit note 223 at 135.

²³⁷ Surah 24:2 'The woman and the man guilty of adultery or fornication — flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.'

²³⁸ Jumah op cit note 223 at 136.

The suspect will be convicted of having committed the crime if he confesses the crime, or if the necessary evidence is presented, or if the accuser swears (*al-le'an*). The following requirements concerning the suspect must be fulfilled: He must have reached puberty, he must be mentally sane and he must have committed the act by free choice and he cannot be the father or grandfather of the victim. The requirements concerning the victim are that the victim must be a free person; he must be Muslim, mentally sane and be of good reputation.

²³⁹ Bakr Bin Abdulah Abu Zayd *Al-Hudud wal Tazirat ind Ibn al-Qayim* (1994) 212.

²⁴⁰ Surah 24:4 'And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) — flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors.'

The crime of defamation (*qazf*) as well as its punishment can thus indeed be found in the Qur'an and the punishment of flogging can be considered as being divinely prescribed.

4. Theft (*sariqa*)

The traditional definition of theft (*sariqa*) is 'stealing something that belongs to someone else from a locked place'.²⁴¹ The assigned punishment for the act of theft according to Islamic jurisprudence is amputation of the hand at the wrist if the thief is convicted for the first time. If the thief steals again, his foot will be cut off at the ankle. If he commits the crime again, he will be imprisoned until he repents or dies.²⁴²

The Qur'an mentions the crime of theft and its punishment in Surah 5:38.²⁴³ The punishment assigned in this verse is 'cutting the hand' of the thief, usually understood as the amputation of the hand. It is important to note, though, that the meaning of 'cutting the hand' is not fully clear. It could as well have a metaphorical meaning, referring to stopping the hand of the thief from reaching the money or the property of the people.²⁴⁴

In summary then, regardless of whether the punishment assigned in the Qur'an has a metaphorical meaning or whether it refers to a physical amputation of the hand, Islamic jurisprudence went beyond the qur'anic definition by assigning further amputations and imprisonment for repeat offenders. The additional punishments for theft assigned by Islamic jurisprudence that go beyond what has been prescribed in the Qur'an, can therefore not be considered (fully) divine.

²⁴¹ Jumah op cit note 223 at 138.

²⁴² Ibid.

For the suspect to be convicted of having committed the crime, two witnesses are required or the confession of the suspect (twice). The traditional regulations concerning the crime of theft furthermore require for a suspect to be convicted that he has stolen secretly, with no doubt, from a specific place, a specific amount with a value of at least a quarter denar.

In the following exceptional cases an act of theft will not be considered to be *hadd*: a) If the theft took place in a time of famine; and b) if the stolen thing is water, alcohol, a Qur'an copy, a music instrument, a cross or idol, a statue, a book with drawings or non-Islamic material.

For the punishment to be enforced on the suspect, he must fulfill the following requirements: a) The thief has to have reached the age of adolescence; b) he has to know about the prohibition; c) he must have done it by his own free choice; d) he must be sane; and e) the stolen object must be money.

²⁴³ Surah 5:38 'As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power.'

²⁴⁴ Mohammed Shahrur *Al-Kitab wal-Quran* (1990) 455.

5. Drinking alcohol (*shurb al-khamer*)

The traditional definition of the crime of *shurb al-khamer* as developed by the Muslim jurists is ‘drinking any kind of drink that can cause the person to get drunk’.²⁴⁵

The punishment for drinking assigned by Islamic jurisprudence is public flogging with 80 lashes,²⁴⁶ provided that the offender is a free person.²⁴⁷ Concerning a free person, there are two different prescriptions in the *Sunnah*, the first requires 80 lashes, the second only 40.²⁴⁸

The Qur’an mentions the crime of drinking or getting drunk in Surah 5:90²⁴⁹ that declares that intoxicants and gambling is an abomination to Allah. However, the Qur’an does not assign any punishment for it. In addition, there is no correct *hadith* to support the flogging for drinking alcohol. Consequently, the punishment by means of a public flogging for the offence of drinking alcohol cannot be considered divine.

6. Fighting against Allah and His Messenger (*haraba*)

The definition of *haraba*, according to Islamic jurisprudence, is waging war against Allah or His Messenger by word or deed, and spreading corruption on earth, including highway robbery.²⁵⁰ The punishment assigned by Islamic jurisprudence is exactly the one that has been assigned in the Qur’an in Surah 5:33 namely ‘execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land’.²⁵¹ Hence, the punishment for the crime of *haraba* assigned by Islamic jurisprudence can indeed be considered to be divinely assigned.

A big difference between the qur’anic prescriptions and those developed by Islamic jurisprudence still exists, namely, in the definition of the crime on which these punishments

²⁴⁵ Jumah op cit note 223 at 137.

For the punishment to be enforced, the following conditions have to be fulfilled: a) The suspect must have reached the age of puberty/adolescence; b) the suspect must have committed the act by free will; c) the suspect must have known the prohibition of the crime; and d) the suspect must be Muslim.

²⁴⁶ In contrast to the Hanafi, Maliki and Hanbali schools of jurisprudence, which agree on a punishment of 80 lashes, the Shafei school assigned only 40 lashes.

²⁴⁷ Islamic jurisprudence assigns a different degree of punishment, depending on whether the crime has been committed by a free person or a slave. For the latter the punishment is only 40 lashes.

²⁴⁸ Salih al-Fawzan *Al-Mulahas al-Fiqhi* (2005) vol 2 at 543.

According to Sahih Muslim, the Prophet and Abu Bakr ordered that 40 lashes be given and Umar ordered that 80 lashes be given. *Sahih Muslim* (2007) vol 4 ch 8 at 482–4 *hadith* 4454 & 4457.

²⁴⁹ Surah 5:90 ‘O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination — of Satan’s handwork: eschew such (abomination), that ye may prosper.’

²⁵⁰ Jumah op cit note 223 at 139.

²⁵¹ Surah 5:33 ‘The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.’

are imposed. The Qur'an defines the crime of *al-haraba* in Surah 5:33 as waging war against Allah and His Messenger and striving for mischief throughout the land. 'Spreading corruption on earth' or 'striving for mischief' is interpreted by Islamic jurisprudence as the rebellion of armed groups or individuals against the Muslim society by causing chaos and the bloodshed of innocents, including robbery and rape.²⁵²

The addition to 'waging war', namely 'by saying or deed', that has been added by Islamic jurisprudence, gave a completely new meaning and dimension to the crime, as this definition can be interpreted extremely widely. In summary, it can be said that the extremely harsh and cruel punishments mentioned above are indeed prescribed by the Qur'an, however, according to Islamic jurisprudence it is meted out even for 'waging war against Allah by word', which does not fall under the qur'anic definition.

It can be seen from the above review of all six *hudud* crimes and their punishments that there are many contradictions between the prescriptions developed by Islamic jurisprudence and those assigned in the Qur'an or the correct *Sunnah*. The claim that all the punishments assigned for *hudud* crimes are divinely prescribed and thus holy, perfect and not negotiable has thus been refuted.

Further, when the above information is taken into account, namely the fact that the number of *hudud* crimes is not clear, and the fact that the term *hudud* does not refer to punishment, the claim that *hudud* ordinances are a fixed set of a specific number of *hudud* crimes and their divinely assigned, mandatory, perfect and immutable punishments has thus been proven to be wrong. As a result, questioning and examining the *hudud* ordinances, their harsh punishments and the legal justifications for those punishments cannot be seen as an assault upon Allah. It is legitimate and even necessary, therefore, to identify which punishments are divinely prescribed and which are not, and to explore as to how far they can be reformed.

V Conclusion

The claim that *hudud* ordinances with their cruel and inhuman punishments are divine and infallible and therefore immutable and non-negotiable²⁵³ is based on several misconceptions that have been clarified in this chapter. One of them is a widespread misunderstanding of the terms *Shariah* and Islamic law. It has been pointed out that *Shariah* refers to the provisions

²⁵² Abdul Qadir Audah *Al-Tasheria al-Jinai al-Islami Muqaranan bil Qanun al-Wadai* (2008) 542.

²⁵³ The Muslim orthodox position which defends this claim is discussed in depth in Chapter 5.

given by Allah in the Qur'an and the correct *Sunnah*, all of which are considered to be divine, eternal and infallible. Islamic law, conversely, includes not only the *Shariah* prescribed rules and regulations but also those that have been developed by the *fuqaha* during the centuries as a human effort to interpret the God-given provisions, especially in cases that are not explicitly ruled on in the Qur'an or the *Sunnah*. All these rules and regulations reflect human opinions and interpretations, and can therefore not be considered infallible or divine.

It has been pointed out that Islamic jurisprudence is a much-debated field, especially due to its use of weak or false *ahadith*. It is important, therefore to distinguish between the God-given provisions of *Shariah* and the human-made interpretations and provisions developed by Islamic jurisprudence, which can be wrong and can even conflict with *Shariah* itself. The Islamic conflict with human rights derives mainly from the rules and regulations of Islamic law that have been developed by Islamic jurisprudence. This is also true for *hudud* ordinances, where significant differences can be seen between the rules and regulations that have been developed by Islamic jurisprudence and the provisions of *Shariah*.

The punishment for apostasy assigned by Islamic jurisprudence, for example, has no legal basis in the Qur'an and even contradicts *Shariah*, for the Qur'an declares that there is no compulsion in religion. The punishment of stoning for adultery that has been assigned by Islamic jurisprudence contradicts the punishment for adultery assigned in the Qur'an. The punishment for drinking alcohol assigned by Islamic jurisprudence has also no legal justification in the Qur'an or correct *Sunnah*. For the crime of theft, Islamic jurisprudence has assigned punishments that go beyond what has been assigned in the Qur'an, and the *haraba* punishments assigned in the Qur'an has been assigned by Islamic jurisprudence to a wider range of crimes than those prescribed in the Qur'an. These examples disprove the claim that all *hudud* punishments have been divinely assigned.

The widespread misconception that all *hudud* punishments are divine and infallible is based on the understanding that the term *hudud* means 'punishments' and that *hudud* refers to the rights of Allah and can therefore not be questioned, forgiven or amended. As demonstrated in this chapter, the interpretation of the term *hudud* as 'punishment' is not tenable since it contradicts its meaning in the Arabic language, and its use in the Qur'an. A reading of the correct *Sunnah* also shows that whenever the Prophet Muhammad used the word *hadd*, he was referring to a crime, not a punishment.

The chapter has further refuted the notion that *hudud* ordinances refer to a fixed set of a specific number of crimes and their punishments. It has been pointed out that there is no agreement among the four Sunni schools of jurisprudence as to the number of crimes that can

be considered part of the set of *hudud* crimes. Further, there is no mention of such a set of crimes in the Qur'an and the correct *Sunnah*. Quite the contrary, *Shariah* actually provides in the correct *Sunnah* a list of seven crimes that are described as the worst sins, or the seven 'destroyers', and this list does not match/reflect the list claimed as *hudud* crimes.

By refuting the claim that *hudud* ordinances are a divine and non-negotiable set of crimes and their divinely assigned punishments, the chapter has demonstrated that questioning the widely accepted *hudud* ordinances should not be considered an assault upon Allah. In fact, it is the converse that is true. A critical examination of *hudud* ordinances actually serves *Shariah*, for exploring whether the *hudud* crimes and punishments assigned by Islamic jurisprudence really reflect the will of Allah helps identifying inappropriate human (mis)interpretations.

The chapter has demonstrated that *Shariah* is supposed to have the final word as to what can be considered to be a crime and which punishment should be meted out for it. It has, further, pointed out that the main purpose of *Shariah* is to serve the benefit of the people. Several sources of *Shariah*, including *al-masalih al-mursalah*, *istihsan* and *sadd al-zara'i*, are actually designed explicitly to operate for the benefit of people and to protect them from harm. Since it can be presumed that human rights benefit society, it can be assumed that *Shariah* would allow for a different, more human rights-based, interpretation of *hudud* ordinances than the one currently widely accepted. This is particularly so, since *Shariah* is known to be flexible enough to fit for all times and all circumstances.

Chapter 6 of this thesis will further explore whether and how the principles of *Shariah* can be applied in a way to reconcile *hudud* punishment with the international laws of human rights.

CHAPTER 3

THE CONFLICT BETWEEN THE ISLAMIC WORLD AND INTERNATIONAL HUMAN RIGHTS

I Introduction

In the fulfilment of the purpose of this research, which is to resolve the conflict between Islamic criminal law, particularly the *hudud* punishment, and international human rights laws, the aim of this chapter is to identify the twofold nature of the controversy, this being, in the

first instance, the human rights violations caused by *hudud* punishment, and the second being Islamic reservations preventing Muslim countries from bringing their national criminal law into line with international human rights laws.

This chapter begins with a discussion of the Islamic objections to international human rights laws that are based largely on their allegedly western origin.²⁵⁴ This view is exacerbated by the fact that western countries are regarded by orthodox Muslims as hypocritical, biased and applying double standards.²⁵⁵ It is partially for these reasons that orthodox Muslims usually question the universality of international human rights, one of the matters under discussion in this chapter.²⁵⁶

Orthodox Muslims, who see international human rights laws as a western invention and deny their universality, often claim that human rights have been protected under Islam even before the United Nations under the leadership of western countries had been founded,²⁵⁷ and point to the famous Islamic concept of the protection of the five indispensables, designed to protect religion, life, intellect, offspring and property.²⁵⁸ This concept will be discussed further in Chapter 5. The Cairo Declaration of Islamic Human Rights and the Arab Charter of Human Rights can be seen in the same light, namely as efforts to demonstrate that Islam protects human rights.

The universality of human rights is defended in this chapter, where it is also argued that, despite the western influence in the development of international human rights laws, it cannot be denied.²⁵⁹ The history of the concept of human rights shall therefore be presented to demonstrate that human rights cannot be considered a purely western or modern invention, since their roots can be traced back more than 2000 years, and there is actually enough evidence to claim the Middle East as their cradle.²⁶⁰ It is pointed out, further, that *Shariah* protects several core values that can be compared to the human rights that are internationally protected. It is argued, therefore, that there is enough common ground between the Islamic and the international understanding of human rights to support the notion of the universality

²⁵⁴ Mohamed Ahmed Mufti & Sami Saleh al-Wakel *Huquq al-Insan fi al-Fikr al-Syasi al-Gharbe wa al-Sharia al-Islami* (1992) 5 & 36.

²⁵⁵ Ibrahim al-Bayoumi Ghanem *Al-Gharb fi Roeyat al-Harakah al-Islamiyah al-Messriyah* (1999) 19. Zuhair al-Harthy 'Alamiyat huquq al-insan wa izdiwajiyat al-gharb' *Al-Riyadh* 7 September 2010, available at <http://www.alriyadh.com/557760>, accessed on 3 November 2015.

²⁵⁶ Al-Khudairi op cit note 22; Mahbub op cit note 20.

²⁵⁷ Al-Khudairi op cit note 22; Al-Qaisi op cit note 55 at 11.

²⁵⁸ Madkoar op cit note 62.

²⁵⁹ This does not mean to argue that human rights are absolute, timeless, or unchanging; any conception of human rights is specific to and contingent upon historical circumstances. Jack Donnelly *Universal Human Rights in Theory and Practice* (2003) 1.

²⁶⁰ Hossein Ansarian 'Huquq al-inssan fi shariaht Hammurabi' 14 October 2009, available at <http://www.erfan.ir/arabic/6434.html>, accessed on 16 April 2016.

of human rights.²⁶¹

Secondly, this chapter includes a discussion of the human rights violations caused by the application of *hudud* ordinances. The most obvious violation is the one caused by the ‘cruel, degrading or inhuman punishments’ assigned by these ordinances, since these are outlawed by international human rights laws.²⁶² Other basic human rights that are violated by *hudud* ordinances include the principle of equality, the freedom of opinion and expression, as well as religious freedom.²⁶³

Subsequently, the influence of Islamic jurisprudence on the conflict of *hudud* ordinances with human rights is expounded on in this chapter. The individual *hudud* crimes and their punishments are examined and it is pointed out that a significant portion of the prescriptions that conflict with human rights are not based on the Qur'an or correct²⁶⁴ *Sunnah*, but have been developed by Islamic jurists.

Finally, the chapter looks at the different positions held by Muslims regarding human rights and the enforcement of *hudud* ordinances, to investigate their influence on the search for possible ways to reconcile the ordinances with human rights.

II The conflict between the Islamic world and international human rights

(a) Islamic reservations against international human rights laws

Ever since the establishment of the international human rights bodies, the conflict between the theocratic system of Islamic criminal law, more specifically *hudud* ordinances, and the principles of international human rights laws has occupied the minds of not only human rights activists but also orthodox Muslims — who try to defend their conservative convictions,²⁶⁵ as well as moderate Muslims — who strive to find a way to resolve this controversy.²⁶⁶

²⁶¹ Muhammad al-Ghazali *Huquq al-Insan Beina Taalim al-Islam wa Elan al-Umam al-Mutahida* (2005) 212.

²⁶² ICCPR art 7; CAT art 1 (1) and 16 (1).

Khalid Abou El-Fadl *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (2014) 302.

²⁶³ Sudhir Kumar Singh *Human Rights in Pakistan* (2007) 68.

²⁶⁴ ‘Correct’ (*Arab. sahih*) *Sunnah* refers to the *ahadith* that are considered reliable and authentic, in contrast to weak or false *ahadith* that are not acknowledged as (fully) reliable — mostly due to the chain of narrators (*isnad*) or due to problems in the text (*matn*).

²⁶⁵ Abdullah Bin Abdul Mohsin al-Turki *Huquq al-Insan fi al-Islam* (1998) 8.

²⁶⁶ Ismail op cit note 9 at 9.

i. The view of human rights as a western invention

One of the main obstacles to such a resolution arises from the orthodox Islamic perspective that views international human rights as a western invention.²⁶⁷ Orthodox Muslims look at international human rights as a western, liberal, human-made and humanistic construct, and argue that since international human rights principles contradict Islamic and thus ‘God-given’ standards, they are based on human ‘injustice’, and are thus immoral and destructive.²⁶⁸ Orthodox Muslims reject the western understanding of human rights, pointing out that Muslims have a completely different understanding and a different vocabulary concerning human rights.²⁶⁹ They point out that many aspects that the west considers as core human rights are viewed by the Muslims as an infectious disease that should be eradicated.²⁷⁰

One of the main reasons why it is so difficult for Muslim countries to accept what they view as a western invention lies in their deep suspicion and rejection of the west in general, and in particular of the human rights policies of western countries,²⁷¹ which are seen as biased, hypocritical and motivated by considerations of power politics rather than by a serious concern for human rights.²⁷² Western countries are perceived to apply a double standard — especially when it comes to sanctions against countries because of human rights violations.²⁷³ It is thought that they have the tendency to turn a blind eye to the human rights violations of countries with which they have friendly diplomatic relations that they do not want to put at risk.²⁷⁴ The United States (US) is especially criticised for applying double standards,²⁷⁵ since it does not fully comply with human rights norms, as some of its states impose the death penalty,²⁷⁶ even though international human rights laws promote the complete abolition of the

²⁶⁷ Mufti & Al-Wakel op cit 254 at 5 & 36.

²⁶⁸ Ziad Ali al-Jerjawi *Huquq al-Insan fi al-Tarbiya al-Islamiya wa Baad al-Falsafad al-Tarbawiya al-Gharbiya* (1993) 15.

Ali A Allawi *The Crisis of Islamic Civilisation* (2009) 197; Ismail op cit note 9 at 9.

²⁶⁹ Ahmad Buhairi ‘Sheikh al-Azhar: Ala al-gharb an yahtarem nazrat al-Arab wal muslimin li manzumat huquq al-insan’ *Al-Masry al-Youm* 11 Feb 2014, available at <http://www.almasryalyoum.com/news/details/391897>, accessed on 3 March 2014.

²⁷⁰ Ibid.

²⁷¹ Al-Turki op cit note 265 at 20.

²⁷² Ibid.

²⁷³ Mozar Razi ‘Al-elam silah fatah: Al-nifaq al-amriki wa siyasat ezdiwagiyat al-maayir al-gharbiyah’ *Makal Cloud* 25 January 2015, available at <https://www.makalcloud.com/post/5txb7hjgp>, accessed on 1 November 2015.

²⁷⁴ Peters op cit note 32.

²⁷⁵ Razi op cit note 273.

²⁷⁶ David Garland ‘You asked why does the U.S. have capital punishment?’, available at http://photos.state.gov/libraries/amgov/133183/english/P_You_Asked_WhyCapitalPunishment_English.pdf, accessed on 1 November 2015.

death penalty.²⁷⁷ Further, members of its armed forces have tortured prisoners of war in the detention camp in Guantanamo Bay in Cuba and the Abu Ghraib prison in Iraq,²⁷⁸ thereby once more violating the ban on torture or cruel, inhuman or degrading treatment or punishment, as articulated in the UDHR (art 5), the CAT (art 2 para 1), the ICCPR (art 7), and the ACHPR (art 5). Muslim countries, furthermore, criticise western countries, especially the United States (but also the European Union), for having subordinated their human rights policy to their national interests.²⁷⁹ This can be seen, for example, in their attitude towards Iran²⁸⁰ and Saudi Arabia. Even though the human rights violations in Saudi Arabia are not less than those in Iran,²⁸¹ none of the western countries seem to be willing to jeopardise their good relations with Saudi Arabia,²⁸² whilst Iran is criticised harshly.²⁸³

Orthodox Muslims, further, are disturbed by the west's influence and interference in Islamic countries, especially since the west is viewed as being immoral and irreligious.²⁸⁴ Orthodox Muslims blame the west for trying to export their immoral principles, products and way of life to Muslim countries.²⁸⁵ In fact, they blame the west for causing — or at least significantly contributing to — all social, political and economic problems.²⁸⁶ They view western countries as colonisers who invaded the land of Islam, thereby replacing *Shariah* law with European secular law to govern the Muslim society.²⁸⁷ This argument refers to the process of modernisation that took place in the nineteenth century when Islamic criminal law was replaced by Western-type criminal codes in most parts of the Islamic world. It is only

²⁷⁷ See Chapter 3 II (a) iv at 81.

²⁷⁸ Seymour M Hersh 'Torture at Abu Ghraib: American soldiers brutalized Iraqis: How far up does the responsibility go?' *The New Yorker* 10 May 2004, available at <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>, accessed on 1 November 2015.

²⁷⁹ Paul Richter 'U.S. sharply criticizes Iran's human rights record on eve of nuclear talks' *Los Angeles Times* 25 June 2015, available at <http://www.latimes.com/world/middleeast/la-fg-rights-report-20150625-story.html>, accessed on 1 November 2015.

²⁸⁰ Ibid.

²⁸¹ Mohammed Albulasy and Abdulaziz al-Sharif 'America tashaq al-maaeyer al-muzdawagah' *El-Watan News* 6 March 2014, available at <http://www.elwatannews.com/news/details/431349>, accessed on 1 November 2015; Andy Fitzgerald 'Why won't the west call out Saudi Arabia for persecution of democratic activists?' *The Guardian* 29 December 2013, available at <http://www.theguardian.com/commentisfree/2013/dec/29/saudi-arabia-us-human-rights-persecution-activists>, accessed on 1 November 2015.

²⁸² 'U.S. – Saudi Relations' *The US Council on Foreign Relations (CFR)* 1 October 2015, available at <http://www.cfr.org/saudi-arabia/us-saudi-relations/p36524>, accessed on 16 April 2016.

²⁸³ Carol Morello 'Iran criticized for human rights abuses in State Department report' *Washington Post* 25 June 2015, available at https://www.washingtonpost.com/world/national-security/iran-criticized-for-human-rights-abuses-in-state-department-report/2015/06/25/523a83aa-8743-42df-8794-11bfa46a0530_story.html, accessed on 16 April 2016.

²⁸⁴ Al-Gharbawi op cit note 14 at 115.

²⁸⁵ Ibid.

²⁸⁶ Galal al-Aalem *Qadat al-Gharb Yaqulun Damirw al-Islam wa Abidw Ahluh* (1974) 24 & 47, available at <http://waqfeya.com/book.php?bid=4118>, accessed on 1 November 2015.

²⁸⁷ Al-Ghazali op cit note 20.

since the last decades of the twentieth century that there has been a return to Islamic penal codes in countries like Saudi Arabia, Pakistan, Sudan, Iran and Afghanistan.²⁸⁸

It is understandable that, due to the historical role of western colonial powers, which wrongfully occupied other countries, the distrust felt by Muslims for western countries has still a great impact even today and causes orthodox Muslims, in particular, to view attempts to enforce laws of allegedly western origin on them as an assault on their Islamic identity and as a western ploy aimed at undermining Islam by attacking its strongest base: the *Shariah*.²⁸⁹

The view of human rights as a western invention is furthermore based on the fact that the western countries have played a key role in the development of the international human rights bodies that are leading the effort towards the protection of human rights in our world today.²⁹⁰ The roots of human rights principles can, however, be traced much further back.

ii. The historical development of international human rights law

The emergence of international human rights laws that are based on the concept of individual rights can indeed be seen as a result of the crucial developments that took place in the west. The American Revolution and the French Revolution, for example, spread the ideology of rationalism and humanism.²⁹¹ This ideology derived from ancient Greece and the Roman Empire and was revived in Europe during the Renaissance.²⁹² During the Age of Enlightenment, the ideas of rationalism and humanism were developed into the political sphere.²⁹³ Since this ideology is quite contrary to the theocentric ideology of Islam, this can explain why international human rights laws are considered a western product.

This, however, is just part of the truth and can evoke a quite biased view. As a matter of fact, the roots of human rights principles can be traced much further back and some of them can be found in the Middle East, which interestingly is today the geographical area known for its human rights violations.²⁹⁴ The Middle East is known as the birthplace of the three major world religions, namely, Judaism, Christianity and Islam, all of which influenced the world community and human rights significantly.²⁹⁵ Human rights can be considered as having

²⁸⁸ Peters op cit note 32 at 2 & 142.

²⁸⁹ Mahbub op cit note 21.

²⁹⁰ Al-Turki op cit note 265 at 7.

²⁹¹ Ibid.

²⁹² Micheline R Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (2004) 82.

²⁹³ Ibid.

²⁹⁴ James Paul & Joe Stork 'The Middle East and human rights' *Middle East Research and Information Project MER* (1987) 17 (149), available at <http://www.merip.org/mer/mer149/middle-east-human-rights>, accessed on 16 April 2016.

²⁹⁵ Abdul Razak Rahim Salal *Huquq al-Insan fi al-Adyan al-Samawiyah* (2008) 46, 97 & 155.

started in the Middle East and having spread from there all around the world, as several of the first known documents that protect human rights in some way or the other, including the Babylonian Cyrus Cylinder and the Code of Hammurabi, were born in Middle-Eastern countries.²⁹⁶ The Bible, which originated in the Middle East as well, can also be seen as a crucial source of human rights protection.²⁹⁷ Jews point to the Torah as the source of modern ideas of human rights,²⁹⁸ and Christians to the New Testament,²⁹⁹ while Muslims view the Qur'an as protecting human rights.³⁰⁰ The Ten Commandments, which are shared by all three Abrahamic religions, can be considered a common basic human rights document.³⁰¹ Another root for human rights ideas can be found in the views of the Stoics of late antiquity, who shaped the idea of natural law.³⁰² The oldest source of human rights seems to have been written by the ancient Egyptian pharaoh, Menes, whose true identity points to one of two kings, namely Narmer and Aha.³⁰³ One of the oldest ancient documents that still exists today is the Cyrus Cylinder of 539 BC that was produced in Babylon.³⁰⁴ The importance of this ancient document has been acknowledged by the United Nations (UN), and it has been translated into the six official languages that have been adopted by the UN.³⁰⁵ This ancient Babylonian charter, crafted on a baked clay cylinder in the Akkadian language in cuneiform script, includes several key elements of universal human rights, including freedom of religion,³⁰⁶ the prohibition of slavery,³⁰⁷ racial equality³⁰⁸ and protection from oppression.³⁰⁹

²⁹⁶ Irving Finkel *The Cyrus Cylinder: The King of Persia's Proclamation from Ancient Babylon* (2013) 4; Robert Francis Harper *The Code of Hammurabi, King of Babylon* 2 ed (1904) 113.

²⁹⁷ Joshua Berman 'Did human rights begin with Torah?' *Chabad* 7 May 2015, available at http://www.chabad.org/library/article_cdo/aid/1125703/jewish/Did-Human-Rights-Begin-With-Torah.htm, accessed on 10 May 2015.

²⁹⁸ Walter J Harrelson *The Ten Commandments and Human Rights* (1977) 32.

²⁹⁹ *Ibid* at 131.

³⁰⁰ Samir Astivo 'Huquq al-insan fi al-Massihyah' *Al-Hewar al-Mutamadin* iss 2248, 11 April 2008, available at <http://www.ahewar.org/debat/show.art.asp?aid=131103>, accessed on 30 October 2015.

³⁰¹ Joshua Berman 'Did human rights begin with Torah?' *Chabad* 7 May 2015, available at http://www.chabad.org/library/article_cdo/aid/1125703/jewish/Did-Human-Rights-Begin-With-Torah.htm, accessed on 10 May 2015.

³⁰² Brad Inwood *Stoicism: The Cambridge History of Philosophy in Late Antiquity* (2011) vol 1 at 126–39.

³⁰³ Ernst Bloch *Natural Law and Human Dignity* 3 ed (1996) 260; N.S. Gill 'Menes — First King of Egypt' available at <http://ancienthistory.about.com/od/mmen/g/Menes.htm>, accessed on 15 July 2015.

³⁰⁴ Some sources claim that it was the ancient Egyptian pharaoh known as 'Menes' (ca. 3040 BC) who first 'protected and preserved human rights as they are today, giving everyone equal rights under the law with the exception of slaves' viz 'Ancient Egyptian kings' *Law Teacher* (November 2013), available at <http://www.lawteacher.net/free-law-essays/criminology/ancient-egyptian-kings.php?cref=1>, accessed on 2 August 2015.

³⁰⁵ David Saunders 'Understanding the Cyrus Cylinder' *Getty Online* 28 October 2013, available at <http://blogs.getty.edu/iris/understanding-the-cyrus-cylinder-getty-voices/>, accessed on 1 November 2015.

³⁰⁶ '[E]veryone is free to choose a religion...', viz 'Cyrus Charter of Human Rights Cylinder: First Charter of Human Rights' available at <http://www.farsinet.com/cyrus/>, accessed on 10 May 2015.

³⁰⁷ *Ibid*.

³⁰⁸ *Ibid*.

Its provisions actually match the first four articles of the Universal Declaration of Human Rights (UDHR) of 1948 that speak about equality in dignity and rights, liberty and security of person and the prohibition of slavery.³¹⁰

The idea of human rights as presented by the Babylonian charter spread all over the globe.³¹¹ It reached the Far East via India and it reached Europe via Greece and Rome.³¹² The spread of the idea of human rights led to the rise of the concept of 'natural law' that influenced the Magna Charta of 1215, which promoted the individual rights of people.³¹³ This development contributed a major influence on the emerging concept of democracy.³¹⁴ In the year 1628, the 'British Petition of Right' was drawn up to promote justice by granting people a fair trial.³¹⁵ The United States Constitution, signed in 1787, became a powerful document protecting and granting many aspects of human rights.³¹⁶ Two years later, in 1789, the French 'Declaration of the Rights of Man and of the Citizen' was introduced as a major step in advancing human rights in Europe,³¹⁷ and in 1791, the 'Bill of Rights' was adopted as the first ten amendments to the US Constitution.³¹⁸

Mechanisms for human rights protection were thus set in place by the end of the nineteenth century, even though at that time they existed merely just on paper and were not yet practiced effectively.³¹⁹ The two world wars of the twentieth century caused an unprecedented violation of human rights.³²⁰ Following the end of the Second World War in 1945, representatives of 48 nations came together and produced the most powerful human rights document the world had ever seen: the Universal Declaration of Human Rights.³²¹ It

³⁰⁹ Ibid; A De Baets 'History and historiography of human rights and their abuses' in *International Encyclopedia of the Social & Behavioral Sciences* (2001) 7016–18, available at http://www.culturahistorica.es/de_baets/history_of_human_rights.pdf, accessed on 4 July 2014.

³¹⁰ UDHR arts 1–4.

³¹¹ H.E.N.R. Dewi Nurmayani 'What are human rights?' *Global Ethics Network* 7 March 2013, available at <http://www.globalethicsnetwork.org/profiles/blogs/what-are-human-rights>, accessed on 10 May 2015.

³¹² Ibid.

³¹³ Jon Roland 'The Magna Carta (The Great Charter)' *Constitution Society*, available at <http://www.constitution.org/eng/magnacar.htm>, accessed on 10 May 2015.

³¹⁴ Ibid.

³¹⁵ Jon Roland 'The petition of right 1628' *Constitution Society*, available at <http://www.constitution.org/eng/petright.htm>, accessed on 10 May 2015.

³¹⁶ 'The Constitution of the United States: A transcription' *US Archives*, available at http://www.archives.gov/exhibits/charters/constitution_transcript.html, accessed on 10 May 2015.

³¹⁷ Ibid.

³¹⁸ US Bill of Rights *US Archives*, available at http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html, accessed on 10 May 2015.

³¹⁹ Todd Landman & Edzia Carvalho *Measuring Human Rights* (2010) 128.

³²⁰ Michael N. Schmitt & Leslie C. Green (eds) 'Violations of human rights in time of war as war crimes' (1995) 70 *International Law Studies*.

³²¹ George J Andreopoulos 'Universal Declaration of Human Rights (UDHR)' (2014) in *Encyclopedia Britannica*, available at <http://www.britannica.com/EBchecked/topic/618067/Universal-Declaration-of-Human-Rights-UDHR>, accessed on 10 May 2015.

was passed by the General Assembly of the United Nations on 10 December 1948 by 48 votes to none, with eight abstentions.³²² Subsequently, the Human Rights Commission developed further human rights documents, including the two International Covenants on Human Rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR)³²³ and the International Covenant on Civil and Political Rights (ICCPR).³²⁴ These, together with the UDHR, are known as the International Bill of Rights.³²⁵ The aforementioned human rights documents promote equality and the respect for all human beings, giving wide-ranging protection for life, body, dignity and sanctity, as well as personal freedoms including freedom of thought, opinion, belief, religion, worship, and work and protect from violence, cruelty, injustice and arbitrariness.³²⁶ Today many countries around the world have incorporated the protection of human rights in their constitutions.

iii. The Islamic world's attitude towards international human rights laws

Most Muslim countries, including Saudi Arabia, Sudan, Pakistan and Brunei Darussalam, that can be said to represent the four Sunni schools of jurisprudence, have by now become signatories of the main human rights documents. Saudi Arabia adopted the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)³²⁷ by accession on 23 September 1997 and ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³²⁸ on 7 September 2000. Pakistan became a signatory to the ICESCR (signed on 3 November 2004 and ratified on 17 April 2008), the ICCPR and CAT (signed on 17 April 2008, ratified 23 June 2010) and the CEDAW (accessed to on 12 March 1996). Sudan adopted the ICCPR and ICESCR by accession on 18 March 1986 and signed the CAT on 4 June 1986. Brunei adopted the CEDAW by accession on 24 March 2006.

Despite the fact that most Muslim states have by now become signatories to the main

³²² Ibid.

³²³ ICESCR art 27 adopted 16 December 1966 by the UN General Assembly and entered into force 3 January 1976.

³²⁴ Ibid art 49.

³²⁵ International Bill of Human Rights, The Council on Foreign Relations (CFR) Washington, DC, available at <http://www.cfr.org/human-rights/international-bill-human-rights/p27020>, accessed on 10 May 2015.

³²⁶ John P Humphrey 'The International Bill of Rights: Scope and implementation' (1976) 17 (3) *William and Mary Law Review*, available at <http://risemalawi.org/downloads/International%20Bill%20of%20Human%20Rights.pdf>, accessed on 10 May 2015.

³²⁷ CAT adopted by the UN General Assembly on 10 December 1984 and entered into force on 26 June 1987.

³²⁸ CEDAW adopted by the UN General Assembly on 18 December 1979 and entered into force 3 September 1981.

human rights conventions and treaties, their hesitation to fully accept international human rights treaties can be seen in the number of documents that have not been signed. Sudan, for example, has not signed the CAT and the CEDAW, and Brunei Darussalam has not signed the CAT, the ICCPR and the ICESCR, Saudi Arabia has not signed the ICCPR and the ICESCR, as well as the CEDAW. Apart from that, their willingness to bind themselves to the obligations of the treaties that they had adopted has often been questioned due to the reservations that were entered upon signature or ratification.³²⁹ In fact, in respect of the CEDAW, more reservations aimed at nullifying treaty obligations have been entered on it than on any other human rights convention.³³⁰ Ann E Mayer, in a study titled *Islamic Reservations to Human Rights Conventions*,³³¹ has analysed two representative reservations of Islamic countries to two important human rights conventions and established that at the end of the twentieth century Muslim countries shifted toward a greater acceptance of human rights conventions.³³² Mayer noted, further, that whilst Muslim countries in the 1980s had usually asserted that Islamic law stood in the way of their endorsing provisions of human rights conventions, from 1996 they were moving away from the practice of entering Islamic reservations.³³³ Mayer concluded correctly that Muslim countries increasingly seem to try to convey the impression that an adherence to Islamic law was compatible with adhering to human rights.³³⁴ This stance, however, does not necessarily indicate whether Islamic law is compatible with international human rights law or not, or, in fact, whether they feel bound to it or not. It is rather reflective of political calculations,³³⁵ and a reaction to the pressure from inside and outside the countries. Muslim countries have indeed come under tremendous pressure internationally, especially since the west accuses the Islamic world and its Islamic law of being the main obstacle to a universal adoption of human rights.³³⁶

This accusation is often countered by orthodox Muslims, who claim that *Shariah* is compatible with human rights, and that, in fact, *Shariah* has been protecting human rights even before the western human rights laws were developed.³³⁷

³²⁹ Ann E Mayer 'Islamic reservations to human rights conventions: A critical assessment' (1998) 15 *Recht van de Islam*, 25–45, available at http://www.verenigingrimo.nl/wp/wp-content/uploads/recht15_mayer.pdf, accessed on 20 July 2014.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Jonathan Russell 'Human Rights: The Universal Declaration vs The Cairo Declaration' *LSE's Middle East Centre Blog*, available at <http://blogs.lse.ac.uk/mec/2012/12/10/1569/>, accessed on 2 November 2015.

³³⁶ Ibid.

³³⁷ Al-Khudairi op cit note 22; Al-Qaisi op cit note 55 at 11.

The Cairo Declaration of Islamic Human Rights developed in 1990 by the 19th Islamic Conference of Foreign Ministers,³³⁸ as well as the Arab Charter on Human Rights adopted in 1994 and amended in 2004, can be seen as attempts to demonstrate that Islam does protect human rights.

At first sight, the Cairo Declaration looks very similar to the UDHR, and some paragraphs repeat almost exactly the UN Declaration. In art 1, paragraph (a), for example, the Cairo Declaration declares that ‘all men are equal... without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.’³³⁹ This is almost the same wording of art 2 of the UDHR that declares that

‘[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The crucial difference, however, found in the restrictions giving priority to *Shariah*, for art 2 of the Cairo Declaration declares that ‘it is prohibited to take away life except for a *Shariah* prescribed reason’, and art 24 declares that ‘[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah’. Since the common and widespread use of the term *Shariah* in the Islamic world actually refers to Islamic law that includes, for example, the common understanding of *hudud* ordinances with its harsh punishments, the restrictions nullify the content of many of these articles that both seem — and claim — to protect human rights. Since the drafters of the Cairo Declaration most probably were referring to the common understanding of *Shariah* as being equal to Islamic law, the Declaration can consequently be seen as a sham. It gives a lie to any argument that there is no conflict between *hudud* ordinances and international human rights laws, an issue that will be discussed later in this chapter.

A first version of the Arab Charter on Human Rights was adopted by the League of Arab States in 1994. However, none of the member states, ratified it, and thus the Charter was updated, and this amended version was adopted in 2004 and entered into force in 2008.³⁴⁰ The Charter expresses recognition of the importance of respecting human rights in the Arab world. The first version of the Charter confirmed the right to a life of dignity based on freedom,

³³⁸ Cairo Declaration on Human Rights in Islam, 5 Aug 1990, U.N. GAOR, World Conf. on Hum.Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], available at <https://www1.umn.edu/humanrts/instrree/cairodeclaration.html>, accessed on 16 April 2016.

³³⁹ Ibid.

³⁴⁰ Vera van Hüllen ‘Just leave us alone: The Arab League and human rights’ in T Börzel & V van Hüllen, *Governance Transfer by Regional Organizations: Patching Together a Global Script* (2015) 135; Mohammad Amin al-Medani ‘The League of Arab States and the Arab Charter on Human Rights’ (2015) *Arab Center for International Humanitarian Law and Human Rights Education (ACIHL)*, available at http://www.acihl.org/articles.htm?article_id=6, accessed on 4 August 2015.

justice and peace, and the amended version went even one step further, for it entrenched equality between men and women in the Arab world as well as the protection of children's rights.³⁴¹ The Arab Charter is, however, very inadequate, as it falls short of international standards and lacks of any of the human rights' enforcement mechanism. It has an extremely limited system of monitoring state compliance with the Charter's provisions and has not established a judicial body — there is no Arab Court of Justice.

Despite the fact that Muslim countries increasingly claim to value human rights and pretend to adhere to international human rights law, violations of human rights in them are still reported on a regular basis in these countries. Attempts to enforce human rights compliance in these countries are very difficult. One of the biggest obstacles hindering Muslim countries' compliance with international human rights laws is that Muslims often challenge the legitimacy of modern human rights.³⁴² Because of their view that international human rights laws are a western invention, they question the idea of the universality of human rights.³⁴³

iv. The debated universality of human rights

Universality is one of the basic characteristics of human rights, as these apply, by definition, to all human beings regardless of their race, sex, religion or on the basis of any other distinction. The UDHR, adopted by the international community more than 65 years ago and still the pre-eminent document in the growing corpus of human rights instruments, explains that universality of human rights means that every human being is entitled to rights enshrined in it, that every human being is entitled to the same rights, and that these rights apply to every human being as an individual, protecting it from the collective.³⁴⁴ Furthermore, human rights are fundamental, as they protect basic and essential elements of human existence and are indivisible.

Although the rights set forth in the UDHR have been incorporated into many constitutions in the world, and although the universality of human rights was reconfirmed by the Vienna UN World Conference on Human Rights on 25 June 1993,³⁴⁵ there is no universal

³⁴¹ Van Hüllen op cit 340.

³⁴² Peters op cit note 32 at 174.

³⁴³ Al-Khudairi op cit note 22; Mahbub op cit note 21.

³⁴⁴ Peter Kirchschläger 'Universality of human rights' available at <http://www.theewc.org/uploads/files/Universality%20of%20Human%20Rights%20by%20Peter%20Kirchschlaeger2.pdf>, accessed on 5 August 2014.

³⁴⁵ The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights 24 June 1993, U.N. Doc. A/Conf. 157/24 (Part 1) at 20–46 (13 Oct. 1993) available at

agreement as to the concept of the universality of human rights. Some states oppose the concept by claiming the priority of their own particular interests, namely the sovereignty of the state over the human rights of individuals. Some states, however, claim that their own constitution and their religious system take priority over the universality of human rights,³⁴⁶ especially as regards the private sphere and personal life, questions of religion and culture and rights concerning family, children and marriage,

Those orthodox Muslims who deny the universality of international human rights laws, because of its alleged western origin often point out that Islam had been protecting human rights well before the establishment of international human rights.³⁴⁷ This claim, however, can actually be seen as confirming or supporting the notion of the universality of human rights. According to the Islamic conservative understanding, Islam promotes human rights by protecting the core values of a Muslim society, known as the five indispensables, namely religion, life, intellect, offspring and property.³⁴⁸ According to this understanding, Islam protects these indispensables through its principles, legal framework, code and ethics, all of which are viewed to secure peace, freedom, security and a fruitful happy life for each individual and the entire society.³⁴⁹ The Qur'an and the *Sunnah* are considered to protect these values through manifold regulations, providing a proper context for these rights for all humanity.³⁵⁰ Orthodox Muslims point out that it is for the purpose of defending these values that Islamic law has provided a worldly punishment in addition to that meted out in the hereafter.³⁵¹ They stress the superiority of Islamic law above international human rights law, demonstrating its efforts to protect the dignity and the freedom of all people.³⁵² This Islamic understanding of human rights is based on the Islamic theocratic worldview. Orthodox Muslims point to the qur'anic verses that declare that Islam is the only true religion from God.³⁵³ They praise the Islamic concept of human rights, which they describe being

<http://www.viennadeclaration.com/wordpress/wp-content/uploads/2011/04/Vienna-Declaration-Download.pdf>, accessed on 5 August 2014.

³⁴⁶ Christina M Cerna 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 (4) *Human Rights Quarterly* 741, available at <http://www.jstor.org/stable/762567>, accessed on 5 August 2014; Kirchschläger op cit 344.

³⁴⁷ Al-Khudairi op cit note 22.

³⁴⁸ Saleh Bin Fauzan 'Ad darurat al-hams wa hefz al-Islam laha' available at <http://www.alfawzan.af.org.sa/node/2294>, accessed on 12 July 2015.

³⁴⁹ Abdul-Rahman al-Sheha *Human Rights in Islam and Common Misconceptions* (2010) available at <http://www1.umn.edu/humanrts/research/Egypt/HumanRightsinIslam.pdf>, accessed on 12 July 2015.

³⁵⁰ Al-Khudairi op cit note 22.

³⁵¹ Madkoar op cit note 62.

³⁵² Al-Fawzan op cit note 8.

³⁵³ Surah 2:2 and Surah 2:23.

completely different from the western concept,³⁵⁴ namely, as being based on God's divine and perfect justice and thus being holy and perfect.³⁵⁵

Even though orthodox Muslim scholars believe that the Islamic understanding of human rights is completely different from what they call the western concept, an examination of the core values promoted in *Shariah*, demonstrates that it actually protects several human rights that can be compared to the internationally protected human rights. The Quran speaks, for example, about the protection of the sanctity of life,³⁵⁶ the dignity of all people,³⁵⁷ the principle of fairness, justice and respect,³⁵⁸ the right to privacy,³⁵⁹ and even of freedom of religion.³⁶⁰ The fact that the Qur'an mentions several human rights that match those protected by international human rights laws and by ancient documents, supports the universality of human rights.

Despite the demonstrated similarity between the human rights mentioned in the Qur'an and those being protected by international human rights laws, crucial differences between the two human rights concepts, as pointed out by orthodox Muslims, cannot be denied.

v. The protection of religion as a limit to individuals' human rights

One of the main differences is concerning the protection of religion, which is viewed quite controversially.³⁶¹ On the one hand, the Qur'an says that there shall be no compulsion in religion³⁶² — meaning that everyone can freely choose whether to accept the faith in Allah or not.³⁶³ On the other, orthodox Muslims strongly believe that no Muslim has the right to leave Islam.³⁶⁴ They refute the aforementioned verse (Surah 18:29), claiming that it has been abrogated by Surah 9:5, which is known as the 'verse of the sword'.³⁶⁵ This claim, however, is often debated. Ibn Jarir al-Tabari, for example, refutes their claim in his commentary and

³⁵⁴ Al-Ghazali op cit note 8.

³⁵⁵ Abul A'la Mawdudi *Human Rights in Islam* (1977) 11–12.

³⁵⁶ Surah 17:33.

³⁵⁷ Surah 17:70.

³⁵⁸ Surah 5:8; Surah 49:6+11.

³⁵⁹ Surah 49:12.

³⁶⁰ Surah 2:256.

³⁶¹ Muhammad Salih al-Munajjid 'Protection of religion' available at <http://almunajjid.com/6380>, accessed on 5 November 2015.

³⁶² Surah 2:256.

³⁶³ Al-Alwani op cit note 209 at 112.

³⁶⁴ Muhammad Salih al-Munajjid 'Protection of religion' available at <http://almunajjid.com/6380>, accessed on 5 November 2015.

³⁶⁵ Surah 9:5 'But when the forbidden months are past, then fight and slay the Pagans wherever ye find them, an seize them, beleaguer them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers and practise regular charity, then open the way for them: for Allah is Oft-forgiving, Most Merciful'.

declares that ‘there is no evidence to support this claim’.³⁶⁶ Orthodox Muslims thus deny the protection of the ‘freedom of religion’ found in the Qur'an and instead they uphold the ‘protection of religion’, which is one of the five indispensables, the one being in opposition to the other.³⁶⁷ In contrast to freedom of religion, that is, the ‘freedom (of the individual) to change the religion or belief’ as defined in art 18 of the UDHR, the ‘protection of religion’ actually limits individual’s rights, if their behaviour contravenes the requirements of the religion. The death penalty for apostasy, for example, can be seen in this light, for the justification given for it is the protection of religion.³⁶⁸ Orthodox Muslims argue that no Muslim has the right to choose whether to follow the Prophet or not, and most of all, that no Muslim is granted the right to leave Islam.³⁶⁹ The ‘crime’ of leaving Islam is defined in a *fatwa* as being fulfilled not only if a Muslim abandons Islam by refusing to practice it or denying his commitment to it but also if he or she expresses a dislike for any of the Prophet’s guidance, advice or teachings, or believes that people have the right to choose whether to follow the Prophet or not, or show any kind of loyalty to non-Muslims rather than to Muslims, or refuse to consider as an infidel someone, who according to their understanding of Islam, is considered one.³⁷⁰ Other *fatwas* declare that it is the duty of all Muslims to hate non-Muslims and to consider them as enemies and to be disloyal to them,³⁷¹ and that believing in freedom of religion is the greatest form of apostasy.³⁷² This view clashes fundamentally with the freedom of thought, conscience and religion, protected by art 18 of the UDHR, and is perhaps the best example of the extent to which the orthodox Muslim understanding of Islam contradicts several of the most basic human rights principles protected by international human rights laws and supported by *Shariah* itself.

The main area of conflict between Islamic law and international human rights laws can be found in *hudud* ordinances, as will be seen in the following section.

³⁶⁶ *Tafsir al-Tabari* (1994) vol 2 at 132.

³⁶⁷ Ismail Ibn Umar Ibn Kathir *Tafsir Ibn Kathir* 2 ed (1999) vol 4 at 111.

³⁶⁸ Saad al-Din al-Hilali *Muqef al-Islam min al-Riddah* (2010) 13, available at <http://www.kantakji.com/media/6109/w302.pdf>, accessed on 3 January 2015.

³⁶⁹ Naser Bin Ahmed Bin Ali al-Adani *Sharh Nawaqed al-Islam* (2010) 128–45.

³⁷⁰ *Ibid* at 31–40.

³⁷¹ Fatwa about loyalty to infidels issued by the General Presidency of Scholarly Research and Ifta, Saudi Arabia, available at <http://www.alifta.net/default.aspx?language=en>, accessed on 2 December 2013.

³⁷² Ibn Uthaymeen *Fatawa wa Rasael Ibn Uthaymeen* (1413 AH) 217–18.

(b) The conflict of *hudud* ordinances with international human rights laws

i. Cruel, inhuman and degrading punishment

Hudud ordinances violate the norms of international human rights in many ways. One of the most obvious areas of conflict relates to the ‘cruel, degrading or inhuman punishments’ such as stoning, flogging, amputating limbs, cross amputation, crucifying and beheading, all of which are outlawed by art 5 of the UDHR, art 7 of the ICCPR and arts 1 (1) and 16 (1) of the CAT, as has been repeatedly pointed out by human rights writers.³⁷³

The actual scope and definition of the phrase ‘torture, cruel, inhuman and degrading punishments’ has been subject to some critical debates, especially since pain or suffering arising from lawful sanctions has been explicitly excluded from the definition of torture in art 1 of the CAT.³⁷⁴ Other articles of international human rights laws, however, prohibit the implementation of torture and any forms of cruel, inhuman and degrading punishment with no exception.³⁷⁵ The Human Rights Committee (HRC), moreover, explicitly notes in its General Comment 20 to art 7 of the ICCPR that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and that the said prohibition extends to ‘corporal punishment, including excessive chastisement ordered for a crime’.³⁷⁶ This means that, because *hudud* punishments can be considered ‘corporal punishments and excessive chastisement ordered for a crime’, they are subject to the prohibition of ‘cruel, inhuman or degrading punishment’ according to the ICCPR, even although they might fall within the exclusionary clause of the CAT.³⁷⁷

Furthermore, all the *hudud* penalties are executed in public, which is humiliating and degrading and thus outlawed by the aforementioned articles. The public enforcement of a punishment further harms the inherent dignity of a person, which is one of the basic human rights protected throughout the different human rights documents.³⁷⁸ Closely connected to the aforementioned right is the concept of ‘privacy,’ which is inherent in much of international

³⁷³ Peters op cit note 32 at 175.

³⁷⁴ CAT art 1; Ismail op cit note 9 at 3.

³⁷⁵ UDHR art 5; ICCPR art 7; CAT art 16.

³⁷⁶ Compilation of general comments and general recommendations adopted by human rights treaty bodies, HRI/GEN/1/Rev. 7, 12 May 2004.

³⁷⁷ Ismail op cit note 9 at 3.

³⁷⁸ The inherent dignity of a person is a fundamental right mentioned in the UDHR (although it is not a legally binding document) as well as in the preambles of the ICCPR, ICESCR, CAT and CEDAW. Human dignity was further the central organizing principle of the Vienna World Conference on Human Rights in 1993.

The death penalty as carried out in some states of the USA can be seen in the same light, namely as harming the dignity of a person.

human rights law, and guaranteed explicitly as a right in the ICCPR (art 17). Criminalising consensual sexual relations between two unmarried people can thus be seen as an infringement of the right to privacy.

ii. Discrimination — a violation of the principle of equality

The principle of equality is one of the very basic human rights. Article 2 of the UDHR declares that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion...’. The right to not be discriminated against is also guaranteed in art 26 of the ICCPR, which states:

‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Hudud ordinances infringe the right to equality in several ways as the Islamic law makes distinctions, especially as regards religion and sex, discriminating especially against non-Muslims and women. Non-Muslims are discriminated against because they face harsher punishments than Muslims, for example, for the crimes of adultery or defamation. The details and differences between the prescriptions of the four Sunni schools will be discussed in the following chapter. Women are discriminated against and treated unequally in several ways. First, they are not acknowledged as witnesses to testify in cases concerning *hudud* crimes.³⁷⁹ The discrimination of women, probably the most serious of the violations of international human rights law, however, concerns the *hudud* prescriptions that declare that a woman who became a victim of rape (*zina al-jabr*) bears the onus of proof.³⁸⁰ Thus, according to the *hudud* law concerning adultery, for the offender to be punished the victim has to prove the validity of her claim by providing either four eyewitnesses or the confession of the offender. In other words, it will be almost impossible for her to receive justice and, if she cannot prove her case, she is quite likely to end up being the one to be punished for the crime of defamation.

³⁷⁹ Fatwa about women’s testimony in *hudud* crimes, issued by Sheikh Aqil al-Maqtari, available at <http://almaqatari.net/?p=4624>, accessed on 3 November 2015.

³⁸⁰ Glenn L Roberts *Islamic Human Rights and International Law* (2007) 77.

iii. Violation of freedom of thought, conscience and religion

Hudud ordinances also clash with the right to freedom of thought, conscience and religion, protected by the UDHR (art 18) and guaranteed in the ICCPR (art 18(1)). Criminalising the act of leaving Islam (apostasy) and converting to another religion is an infringement of art 18(2) of the ICCPR, which provides that '[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.'

Similar to the aforementioned right is the freedom of opinion and expression that is protected by the UDHR (art 19) and by the ICCPR (art 19), both of which state in their first paragraph that '[e]veryone shall have the right to hold opinions without interference'. The crime of *haraba* (fighting against Allah and His Messenger) as defined by Islamic jurisprudence, includes any word or deed critical of Allah, the Prophet Muhammad or Islam, and consequently leads to the punishment of persons for holding an opinion critical of Islam.³⁸¹ This is a clear violation of the freedom of opinion. What makes it even worse is the fact that the different kinds of punishment assigned for the crime of *haraba* are extremely harsh and cruel — they range from crucifixion and cross amputation to imprisonment and banishment.³⁸²

iv. Death penalty

The inherent right to life is the most basic human right and thus requires the highest level of protection.³⁸³ Its protection is enshrined in art 6 of the ICCPR, one of the key documents laying out international standards in regard to the death penalty. Article 6, para 1 of the ICCPR states that '[n]o one shall be arbitrarily deprived of his life' and the second paragraph states that in countries which have not yet abolished the death penalty, its implementation should be confined to only the 'most serious crimes'. International human rights laws actually promote the complete abolition of the death penalty.³⁸⁴ It was for that purpose that, in 1989, the UN Second Optional Protocol to the ICCPR was formulated.³⁸⁵ Ten years later, in 1999,

³⁸¹ Ahmed Bin Abdul-Halim Ibn Abdul Salam Ibn Taymiyyah *Al-Saarim al-Maslul ala Shatem al-Rasul* (1997) vol 1 at 13.

³⁸² Surah 5:33.

³⁸³ Melissa Harris-Perry 'A right to life for the living' *The Nation* 5 April 2010, available at <http://www.thenation.com/article/right-life-living-0/>, accessed on 3 November 2015.

³⁸⁴ Eric Prokosch 'Human rights v. the death penalty: Abolition and restriction in law and practice' *Amnesty International*, 1 December 1998, available at <https://www.amnesty.org/en/documents/ACT50/013/1998/en/>, accessed on 17 April 2016.

³⁸⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, December 1989, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>, accessed on 17 April 2016.

the UN Commission on Human Rights (UNCHR) passed a resolution calling on all states that still practice the death penalty to progressively restrict the number of offences for which it may be imposed with a view to completely abolishing it. In 2005 the UNCHR approved the Human Rights Resolution 2005/59 on the question of the death penalty.³⁸⁶ This called for all states that still maintain the death penalty to abolish it completely and, in the meantime, to establish a moratorium on executions. This call was repeated by the UN General Assembly (UNGA) in 2007 in Resolution 62/149.³⁸⁷ Human Rights Watch points out that the penalty is unique in its cruelty and finality, and it is inevitably and universally plagued with arbitrariness, prejudice, and error and should therefore be banned in all countries and under all circumstances.³⁸⁸

Hudud ordinances assign the death penalty for a number of crimes including adultery. Since adultery can hardly be considered a ‘most serious crime’, the assignment of the death penalty for this type of act would be in conflict with art 6 (2) of the ICCPR. This is regardless whether or not there are other countries, including the United States of America, who still adhere to the death penalty and usually justify its use as a deterrent. Globally, however, there is a clear trend towards abolition.³⁸⁹ One of the main reasons for the international call to abolish the death penalty is the potential for errors and the wrongful conviction and execution of innocent persons. Today, most countries have either abolished the death penalty or do not practice it. The number of countries who still practice the death penalty is shrinking constantly.³⁹⁰

v. Procedural abuses

Another area of human rights violations in relation to *hudud* ordinances relates to issues of procedural abuses.³⁹¹ The processes administered when *hudud* ordinances are followed do not offer the accused the basic right to a fair trial that is protected by international human rights

³⁸⁶ Office of the High Commissioner for Human Rights ‘The question of the death penalty Human Rights Resolution 2005/59, 58th meeting, 20 April 2005’, E/CN.4/2005.

³⁸⁷ Amnesty International USA ‘Death penalty and human rights standards’ available at <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-and-human-rights-standards>, accessed on 20 July 2015.

³⁸⁸ Human Rights Watch ‘Saudi Arabia: 100 executions since January 1’ *Human Rights Watch* 16 June 2015, available at <https://www.hrw.org/news/2015/06/16/saudi-arabia-100-executions-january-1>, accessed on 30 July 2015.

³⁸⁹ Ban Ki-moon ‘Preface’ in United Nations *Moving away from the Death Penalty* (2014) 7, available at <http://www.ohchr.org/Documents/Issues/DeathPenalty/MovingAwayDP.pdf>, accessed on 24 July 2015.

³⁹⁰ Ibid.

³⁹¹ Rahat Imran ‘Legal injustices: The zina hudood ordinance of Pakistan and its implications for women’ *Journal of International Women’s Studies* (2005) 7 (2) 78–100, available at <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1435&context=jiws>, accessed on 3 November 2015.

law. The practice of *hudud* ordinances gives suspects no opportunity to defend themselves or to appeal, request a retrial, or call or examine witnesses. This practice violates the right for an accused to defend him- or herself,³⁹² the right to the assistance of a lawyer in pre-trial proceedings,³⁹³ and the right to appeal.³⁹⁴ Further, *hudud* ordinances also violate the right to equality before the law and courts, guaranteed in ICCPR art 14 (1), since women and non-Muslims are treated differently than male Muslims, as will be further discussed in Chapter 4.³⁹⁵ The principle of presumption of innocence, protected in ICCPR art 14 (1), is violated for example by the Maliki school's prescription that a thief has to be punished as any other thief, even if he claims ownership of the stolen object.³⁹⁶

vi. Conflicts of the individual *hudud* crimes with international human rights laws

As can be seen from the above, the bulk of human rights violations results from the punishments and from procedural abuses. Conflicts between *hudud* ordinances and international human rights laws, however, also exist as to the definitions of some of the crimes. While the crime of theft, for example, is also considered a crime by international human rights law, criminalising apostasy severely violates international human right laws, as previously mentioned. In addition, adultery and drinking alcohol are not considered a crime in most countries.

Adultery and defamation are two of the most controversial *hudud* crimes, since their application leads to many different human rights violations, including many aspects of discrimination. While defamation can also be considered a human rights violation under international law, the definition of defamation in the ICCPR and the one in the Qur'an are different. According to art 17 para 1 of the ICCPR '[n]o one shall be subjected to unlawful attacks on his honour and reputation.' In contrast to the ICCPR, the qur'anic definition of the crime of defamation in Surah 24:4 refers only to the protection from false accusations of illicit sexual intercourse. Further, in Surah 24:4 it is only women who are protected from being falsely accused. This could be seen as discriminatory against men. The definition of the crime of defamation, as developed by Islamic jurists by contrast, does not use this distinction and applies the protection from defamation to both men and women equally. Interestingly,

³⁹² ICCPR art 14(3)(d), CRC art 40(2)(b)(ii), and African Charter art 7(1) (c) (and UDHR art 11(1)).

³⁹³ Arab Charter art 16(4) of the; CRC art 37(d).

³⁹⁴ ICCPR art 14(5), CRC art 40(2)(b)(v), Arab Charter art 16(7), and Section N(10)(a) of the Principles on Fair Trial in Africa.

³⁹⁵ Roberts op cit note 380.

³⁹⁶ Al-Dumeri op cit note 517 at 932–47.

however, it is this alternation of the definition that leads to the discrimination of women, as can be seen in Chapter 4, where the *hudud* prescriptions according to the four Sunni schools of jurisprudence are discussed in detail.

The crime of *haraba* (fighting against Allah and His Messenger) as defined by Islamic jurisprudence, includes several different crimes. It refers to acts of war against Muslim society, physical violence such as public robbery, killing or rape, and even to insults against the Prophet and statements or deeds critical of Islam. The different kinds of physical violence are all consistent with international human rights laws. Criminalising statements critical of the Prophet Muhammad or Islam, by contrast, and punishing persons for holding an opinion critical of Islam, is a clear violation of the freedom of thought, conscience and religion.

The individual crimes are to be discussed in more detail in the following section, as well as in Chapters 4 and 6. The following section will discuss the influence of Islamic jurisprudence, to demonstrate its crucial role in the conflict of *hudud* ordinances with human rights.

(c) The influence of Islamic jurisprudence on the conflict of *hudud* ordinances with human rights

Western human rights experts, who complain about the human rights violations in Muslim countries, usually point to *Shariah* as the main source of the conflict.³⁹⁷ Muslim countries that raise objections against international human rights and put reservations to human rights articles, on the other hand, also point to *Shariah* as hindering them to accept international human rights laws.³⁹⁸ Both arguments, however, are not fully correct, since the main obstacle is not *Shariah*, but Islamic criminal law that has been developed by Islamic jurisprudence.³⁹⁹ This reflects the great confusion and misunderstandings both in the west as well as in the Islamic world about the use of the term *Shariah* in contrast to Islamic law that has been described in Chapter 2. The term is very often used to refer not only to the Qur'an and *Sunnah* but also to the rulings of Islamic jurists that in many cases contradict the teaching of the Qur'an and correct *Sunnah*.⁴⁰⁰ A review of the individual *hudud* ordinances shows that in most cases the clash between these and human rights is not caused by *Shariah* as recorded and

³⁹⁷ Heiner Bielefeldt '“Western” versus “Islamic” human rights conceptions? A critique of cultural essentialism in the discussion on human rights' (2000) 28 (1) *Political Theory* 90–121, available at <http://www.jstor.org/stable/192285>, accessed on 4 January 2015.

³⁹⁸ Eva Brems *Human Rights: Universality and Diversity* (2001) 268.

³⁹⁹ Mohammad Habash *Corporal Punishment and Human Dignity for a New Islamic Jurisprudence Against Torture* (2015) 107.

⁴⁰⁰ *Ibid.*

presented mainly in the Qur'an and correct *Sunnah*, but rather by the rules, regulations and provisions of Islamic criminal law as developed by Islamic jurisprudence.⁴⁰¹ Many of these prescriptions are based on weak *ahadith* that cannot be considered to be fully reliable — be it due to their deficient chain of narrators (*isnad*) or the weaknesses of the text (*matn*).⁴⁰²

i. Apostasy (*al-riddah*)

For the crime of apostasy, for example, *Shariah* did not prescribe any punishment to be enforced during this lifetime.⁴⁰³ The Qur'an warns Muslim believers not to leave Islam⁴⁰⁴ and points out that an apostate's life will bear no fruit and that whoever leaves Islam will bear the consequences in the afterlife, as he will end in hellfire.⁴⁰⁵ Islamic jurists, however, assigned the death penalty for the crime of apostasy. As mentioned in Chapter 2, the punishment for apostasy as defined by Islamic jurisprudence declares that the apostate has only three days to repent and return to Islam. If he does not repent, he has to be beheaded by the sword before sunset of the third day.⁴⁰⁶ The *ahadith* used to justify the use of the death penalty for apostasy are weak, and can thus not be considered as a sufficient source to justify it.⁴⁰⁷ The most famous one is the *hadith* according to which the Prophet Muhammad said: 'Whoever change[s] his religion, kill him.'⁴⁰⁸ As mentioned in Chapter 2, this is a weak *hadith*, since Ikrimah, who is one in the chain of narrators, is considered to be untrustworthy.⁴⁰⁹ Further examples will be discussed in Chapter 6. One of them reports, for example, that the Prophet ordered some people to be killed, who 'after having embraced Islam' had stolen the Prophet's camels and killed the shepherds.⁴¹⁰ This case, as with most of the other examples, demonstrates that they were not killed not only for leaving Islam but (also) for physically attacking the Prophet, Islam or the Muslim community. In all cases in which someone was killed after having left Islam, it was rather for political reasons, or for leaving the Muslim society and for fighting against the Muslim community. Notably, there is no *hadith* that reports that the Prophet ever had anyone killed for leaving Islam.

⁴⁰¹ Gamal al-Banna *Qadiyat al-Fiqh al-Jadid* (2001) 17.

⁴⁰² Al-Alwani op cit note 209 at 39.

⁴⁰³ Gamal al-Banna *Huriyat al-Fikr wa al-Eteqad fi al-Islam* (1977) 15.

⁴⁰⁴ Surah 5:54, Surah 4:137.

⁴⁰⁵ Surah 2:217.

⁴⁰⁶ Ibn Taymiyyah op cit note 381.

⁴⁰⁷ Al-Alwani op cit note 209 at 116.

⁴⁰⁸ *Sunan al-Nisa 'i* (2005) vol 7 at 103.

⁴⁰⁹ Fawzia al-Ashmawy 'Huriyat al-aqidah beina al-shariah al-islamiyah wal elan al-alami li-huquq al-insan' (2010) 6.

⁴¹⁰ *Sahih al-Bukhari* (1999) vol 1 at 178–9 *hadith* 233.

Very clear evidence that demonstrates that the Prophet did not kill apostates, can be seen in the *hadith* that reports about a Bedouin man who wanted to turn away from Islam and came repeatedly to the Prophet to ask him for a release from his oath of allegiance.⁴¹¹ The *hadith* reports that the Prophet refused to cancel the oath, but he let him walk away and was unperturbed by his departure.

From these examples it can be seen that the death penalty by beheading that has been assigned by Islamic jurists has no strong legal basis in *Shariah*. Not only did Islamic jurists prescribe a particularly harsh and cruel punishment, in contradiction to *Shariah*, but, at the same time they even widened the definition of the crime of apostasy in a way that it no longer speaks only about the act of leaving Islam,⁴¹² but even includes any expression of doubt as to any aspect of the basic teaching of Islam. The definition developed by Islamic jurists, describes apostasy as ‘leaving Islam willingly by word or doubt or deed’.⁴¹³ This interpretation will mean that a Muslim, who, for example, doubts that Allah is a merciful God, will be guilty of the crime of apostasy and sentenced to death.⁴¹⁴ Denying any of the basic principles of Islam or insulting the Prophet would be considered apostasy by word.⁴¹⁵ The offence of apostasy by deed is fulfilled by abandoning any religious duty, especially by neglecting the prayer, provided that it is not just on account of laziness that he neglects it, but due to a denial of the divine order.⁴¹⁶ This wide definition of the crime, which even includes any doubtful or critical statement, contradicts the right to freedom of opinion and expression and the right to freedom of thought, conscience and religion that are guaranteed by the international laws of human rights. Not all scholars share this interpretation.

Ahmed El-Tayeb, the Grand Imam of al-Azhar, for example, and other *Shariah* scholars including Abdul Hai Azab, Taha Jabir al-Alwani and Muhammad Salim al-Awa reject the above interpretation, since they do not believe that the Prophet killed any apostate. In their

⁴¹¹ *Sahih Muslim* (2007) vol 3 at 530 *hadith* 3355.

⁴¹² *Yartadd* (turning away from the faith) viz Surah 5:45.

⁴¹³ Jumah op cit note 223 at 140.

⁴¹⁴ Alawi Bin Abdul Qadir al-Saqqaf *Al-Tawasut wal Eteqad fi Ana al-Kufer Yakun ema be al-Qawl au be al-Feal au al-Eteqad* (1999) 15.

⁴¹⁵ Ibn Taymiyyah op cit note 381.

⁴¹⁶ Some scholars distinguish between ‘smaller’ and ‘greater’ infidelity, describing smaller infidelity if a Muslim does acknowledge the importance of prayer as a religious duty, and neglects it only due to laziness. Greater infidelity, in this context, is for a Muslim to deny the importance of prayer. Some Hanbali scholars, including Ibn Qudamah and Ibn Batah, do not make a distinction, and consider both infidelities proof of apostasy. Noman Abdul Razeq al-Samara’i *Ahkam al-Murtad* (1983) 63–113.

opinion apostasy can be considered as a crime only if the apostate represents a danger to the state or the society by waging war.⁴¹⁷

ii. Adultery and fornication (*zina*)

Islamic jurisprudence assigned the punishment of stoning to death for adultery committed by married persons and flogging with 100 lashes and one year of exile for those unmarried.⁴¹⁸ The penalty of exile and death by stoning that have been assigned by Islamic jurisprudence, have no legal justification in the Qur'an or the correct *Sunnah*.⁴¹⁹ The Qur'an warns Muslims not to commit *zina*, which is usually translated as 'adultery or fornication', and assigns a flogging of 100 lashes. Since the Arabic original text uses only one term for the crime, namely *zina*, there is logically no distinction between adultery and fornication. Consequently, also in respect of the punishment, no distinction is made as to the marital status of the accused (Surah 17:32 and 24:2).⁴²⁰ There is no single evidence in the Qur'an that would support stoning to death as the punishment for adultery committed by married person; on the contrary,⁴²¹ there are several verses in the Qur'an that contradict this punishment, including Surah 5:32 that warns against killing a person unless for explicitly prescribed reasons: '[I]f any one slew a person — unless it be for murder or for spreading mischief in the land — it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people.'

The different *ahadith* that are employed to defend the punishment of stoning for adultery are all either weak (*ahad*) or contradict the Qur'an.⁴²² They cannot, therefore, provide sufficient evidence to justify the punishment of death by stoning, a particularly cruel and inhuman punishment that violates international human rights laws.⁴²³ Muslim scholars disagree as to whether or not stoning to death has ever been prescribed by Allah or not.⁴²⁴ Two main approaches are employed to justify the imposition of the death penalty by stoning. One group of scholars claims that the Qur'an once contained a verse prescribing stoning to death, known as 'the verse of the stoning' (*ayet al-ragm*), and that the verse got lost and can

⁴¹⁷ 'Sheikh al-Azhar Yakshef Khilaf al-Fuqaha fi tadbiq hadd al-riddah' TV channel CBC Extra, Imam Tayeb program, 16 June 2016, available at <https://arabic.rt.com/news/828109>, accessed on 10 August 2016.

⁴¹⁸ Sayed Sabeq *Fiqh al-Sunnah* (1983) vol 2 at 258.

⁴¹⁹ Ahmed Subhy Mansour 'Ekzubat al-ragm fi al-hadith' *Al-Hewar al-Mutamaden* 1 January 2005 art 1065, available at <http://www.ahewar.org/debat/show.art.asp?aid=29051>, accessed on 17 April 2016.

⁴²⁰ Surah 17:32; Surah 24:2.

⁴²¹ Mansour op cit note 419.

⁴²² *Sahih al-Bukhari* (1997) vol 8 at 420, nos 6813, 6818, 6819.

⁴²³ UDHR (art 5), ICCPR (art 7), CAT (art 2 para 1).

⁴²⁴ Mustafa Mahmud *La Rajm fi al-Islam* (2000) 73–89.

no longer be found in the Qur'an, but that its meaning and the legal provision is nevertheless still valid.⁴²⁵ The proponents of this opinion refer to a weak *hadith* that speaks about stoning to death, saying: 'Al-Sheikh and al-Sheikha [married man and women] if they commit *zina* (adultery or fornication), stone them as a punishment from Allah.'⁴²⁶ This *hadith* is believed to refer to the above mentioned 'verse of the stoning'. There are two different *ahadith* that explain how the said verse got lost, both of which, however, are weak.⁴²⁷ According to the first one, the second caliph, Omar Ibn al-Khattab, explained that the qur'anic 'verse of the stoning' got lost during the time of collection and writing the Qur'an.⁴²⁸ Omar explained that he did not dare to put it back in the Qur'an since he was concerned if it he would do so, people might complain that he had added it, thus, for the sake of peace and to avoid conflict, he did not add it back to the Qur'an.⁴²⁹ Another *hadith* says that Aisha also spoke about the (lost) qur'anic verse of the stoning; according to this *hadith* Aisha said: 'The verse of the stoning ... was revealed, and the paper [that this verse was written in] was with me under my pillow. When the Messenger of Allah died we were preoccupied with his death, and a tame sheep came in and ate it.'⁴³⁰ This *hadith* seems to confirm Omar's claim that the verse of the stoning indeed existed. Yet, as Aisha's report is recorded in twelve different versions that contradict each other, it cannot be considered as strong enough evidence to serve as a legal justification for a penalty as severe as death by stoning. Most importantly, however, the two *ahadith* that are used to attempt to prove the alleged qur'anic verse of the stoning can be refuted by the Qur'an itself, as Allah declared in Surah 15:9⁴³¹ that He guards his word, the Qur'an, from any error or corruption. It can be argued, therefore, that according to this claim Allah would never allow such a crucial qur'anic verse to accidentally disappear from the Qur'an.

A second group of scholars does not refer to the Qur'an as a legal basis for the stoning to death, but relies mostly on two different *ahadith*, both of which are weak as well, since they are reported in different, contradictory versions and since they contradict the provisions of the Qur'an.⁴³² The first of these two *ahadith* reports the case of an unmarried man who committed

⁴²⁵ Al-Jaziri op cit note 190 vol 5 at 57.

⁴²⁶ *Sunan al-Nisa'i* (2007) vol 4 *hadith* 273, narrated by Ibn Abas.

⁴²⁷ Mohammed Sankur 'Ayat al-ragem laisat men al-Quran *Hoda al-Qur'an* 14 December 2008, available at <http://hodaalquran.com/details.php?id=10008>, accessed on 11 November 2015.

Mustafa Buhindi 'Ahadith ayat ragem al-zani tunaqed ahkam al-Quran' *Hespress* 27 July 2014, available at <http://www.hespress.com/orbites/236954.html>, accessed on 11 November 2015.

⁴²⁸ *Sunan al-Nisa'i* (2007) vol 4 *hadith* 273.

⁴²⁹ Ibid.

⁴³⁰ *Sunan Ibn Majah* (2007) 111–12 *hadith* 1944.

⁴³¹ Surah 15:9.

⁴³² Sankur op cit note 427; Buhindi op cit note 427.

adultery with a married woman, and states that the Prophet ordered the woman to be stoned to death.⁴³³ According to this *hadith*, the Prophet Muhammad declared that he would judge the case according to the book of Allah and then he ordered that the man be beaten with one hundred lashes and banished for a year. As for the woman, Muhammad reportedly ordered that she be interrogated about the accusations, and if she confessed she should be stoned. As she did, indeed, confess, she was stoned to death. Interestingly, the Prophet announced that he would judge the case according to the book of Allah, yet the Qur'an does not contain any ruling that would explain or justify the Prophet's sentence of stoning. Consequently, it can be argued that the *hadith* cannot be correct since it contradicts the Qur'an. It is therefore not reliable enough to be used as a legal justification for such a severe punishment.

The second *hadith* which is used to support the stoning for adultery speaks about monkeys.⁴³⁴ According to the *hadith*, its narrator Amr Ibn Maimon reported:

I saw in [the time of] ignorance [ie before Islam] a monkey who committed zina with another monkey. [As a consequence] the other monkeys gathered together and stoned her and I did stone her with them.⁴³⁵

This *hadith* completely contradicts common sense, as everyone knows that monkeys are animals that have no law or criminal awareness and cannot be taken as an example to follow and to justify human behaviour. Using this kind of *hadith* as a legal justification for stoning a person to death appears rather a quite desperate attempt to justify what can hardly be justified. It also ignores the sanctity of human life that is protected by *Shariah*.⁴³⁶

As we can see from the above information, the correct *Sunnah* does not provide sufficient evidence to justify the punishment of stoning to death for adultery committed by married persons. As previously mentioned, the Qur'an, on the contrary, provides strong evidence to disprove the punishment of stoning to death. It has been mentioned further that a punishment for married adulterers that is different from the one for non-married ones thus contradicts Surah 24:2, for the verse does not differentiate between married or unmarried adulterers, or between a man and a woman. The term used in Surah 24:2 that Y. Ali translated as 'their punishment', is *athabahuma* in the original Arabic text. This does not refer to 'punishment' in general, but speaks rather of the specific nature of punishment, that, according to this verse, is specified as a flogging, namely with 100 lashes.⁴³⁷ It is noteworthy that the punishment for

⁴³³ Mohammed Ibn Isa al-Tirmidhi *Sunan at-Tirmidhi* English translation by Abu Khaliyl (2007) vol 3 at 217 *hadith* 1433.

⁴³⁴ Ibn Hajar al-Asqalani *Fath al-Bari Sharh Sahih al-Bukhari* (1989) vol 7 at 335 *hadith* 3849.

⁴³⁵ Ibid.

⁴³⁶ Surah 5:32.

⁴³⁷ Surah 24:2.

defamation ascribed by the Qur'an is of the same nature as for adultery or fornication, namely flogging. This can be seen in Surah 24:4

And those who launch a charge [of adultery] against chaste women, and produce not four witnesses (to support their allegations), – flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors

In other words, the Qur'an is very clear and consistent when speaking about this very specific kind of punishment for *zina*, namely flogging.

Another argument that can be used to counter the punishment of stoning can be seen in Surah 33:30 and Surah 4:25. These speak of two specific groups of married women for whom the punishment for immoral conduct is either half or double the normal punishment. Thus, for the wives of the Prophet it is the double of punishment given to other sinners;⁴³⁸ while non-free women receive only half the penalty.⁴³⁹ If the punishment for adultery by married women would be stoning to death, this would raise the question of how it can be possible to enforce half or double the punishment of death by stoning. This illogicality can be understood only as a rejection of stoning as a form of punishment. Further, Surah 24:3 declares that an adulterer can marry another adulterer only.⁴⁴⁰ This verse also rejects the punishment of death by stoning due to the very obvious contradiction that if adulterers were stoned to death, they could not marry again.

In summary, it can be seen from the above that the very harsh and cruel punishment of stoning to death cannot be seen as divinely assigned and infallible, but it results from the human interpretations of the Islamic jurists, that are not infallible. The main conflict with international human rights, therefore, does not result from *Shariah*, but from Islamic law, hence from the work of Islamic jurisprudence.

iii. Drinking (*shurb al-khamr*)

The punishment for drinking alcohol is another example that shows that the conflict with international human rights is not caused by *Shariah*, but by the prescriptions developed by Islamic jurists, thus by Islamic law. *Shariah* does not prescribe any punishment during this lifetime for the crime of drinking, even though it condemns drinking alcohol, just as it condemns gambling. The reasons for the prohibition of drinking alcohol can be seen in the negative effects that can result from its excessive consumption, both on peoples' personal

⁴³⁸ Surah 33:30.

⁴³⁹ Surah 4:25.

⁴⁴⁰ Surah 24:3.

lives and on their relationship to their family and the rest of the society. Further, it can cause a person to forget about the existence of God. Surah 5:90 says that intoxicants and gambling are an abomination [to Allah].⁴⁴¹ Islamic jurisprudence, however, prescribes as punishment a public flogging with 80 lashes for a free person and 40 for a slave. In contrast to the Hanafī, Maliki and Hanbali schools of jurisprudence, who agree on a punishment of 80 lashes, the Shafei school assigns only 40 lashes. The reason why the exact number of lashes is debated by Muslim scholars is that Islamic jurists base the punishment on two contradicting *ahadith*. One of them speaks about 40 lashes, the other one about 80.⁴⁴² Islamic jurists, further, specify that the beating has to be carried out by men and without interruption, in order to cause fear and torture for the purpose of deterrence.⁴⁴³ None of these prescriptions can be found in the Qur'an.

iv. Theft (*sariqa*)

In the case of the crime of theft, the qur'anic prescription itself clashes with international human rights law, since the punishment for the crime of stealing assigned in the Qur'an is 'cutting the hand' which is usually understood as the amputation of the thief's hand.⁴⁴⁴ Notably, in the same breath, the Qur'an mentions that a thief can be forgiven if he repents.⁴⁴⁵ Islamic jurisprudence, by contrast, does not grant the thief the right to repent. On the contrary, the jurists have developed additional punishments for repeat offenders, from the amputation of further limbs (cross amputation), to decapitation, as well as imprisonment. The different kinds of additional punishments that have been developed by Islamic jurisprudence are cruel, degrading and inhuman, and are therefore banned by international human rights laws. They are based mainly on weak or abrogated *ahadith* that cannot be used as sufficient evidence to justify these kinds of harsh punishments. One of these *ahadith* reported by Abu Hurairah can be considered a weak *hadith* and has been transmitted through an anonymous narrator.⁴⁴⁶ According to this weak *hadith* the Prophet Muhammad said: 'If someone committed theft cut off his hand, if he stole a second time, cut off his leg, if he stole once again, cut off his (other)

⁴⁴¹ Surah 5:90.

⁴⁴² Al-Fawzan op cit note 248.

According to *Sahih Muslim* the Prophet and Abu Bakr ordered that forty lashes be given and Umar ordered that eighty lashes be given. *Sahih Muslim* (2007) vol 4 ch 8 at 482–4 *hadith* 4454 & 4457; *Sahih Muslim* bk 17 no 4226.

⁴⁴³ Al-Jaziri op cit note 190 at 33.

⁴⁴⁴ Surah 5:38.

⁴⁴⁵ Surah 5:39.

⁴⁴⁶ Abu Zayd op cit note 239 at 388.

hand if he stole again, cut off his (other) leg.’ This *hadith* contradicts the Qur’an for the amputation of a foot or leg is not mentioned in the Qur’an or the correct *Sunnah*.

There is, by contrast, a correct *hadith* that quotes the Prophet on the issue of the thief’s repentance.⁴⁴⁷ The *hadith* confirms the aforementioned Qur’anic concept of repentance and sets as a condition for the acceptance of repentance that the stolen object has to be returned. The Prophet said: ‘The hand is responsible for what it has taken until it is given back.’ Imam Shafei and Imam Ahmad, therefore, require that the thief returns to its owner what he has stolen.⁴⁴⁸ Some Islamic scholars agree that this is the only requirement for the repentance to be accepted. If the stolen object was damaged, they ask that it has to be fixed by the thief.⁴⁴⁹ If the object cannot be repaired or recovered, Surah 2:280⁴⁵⁰ is interpreted⁴⁵¹ as saying that he should be given enough time to do so, and that it would actually be best if the debtor were released from his obligation. Hence, this verse can be seen as evidence of the merciful attitude of *Shariah*. Nevertheless, the crime of theft gives one of the strongest proofs to support the claim of human right activists, who see *Shariah* as the problem causing the human rights violations. Since the punishment of ‘cutting the hand’ is based on the Qur’an and can consequently be considered a ‘definite prescription’, it is indeed one of the main challenges for any attempt to reform *hudud* ordinances. Chapter 6, however, will demonstrate that even the punishment of amputation is not inevitable. This is particularly so, since the meaning of ‘cutting the hand(s)’, usually interpreted as an amputation of the hand, is not fully clear. ‘Cutting the hand(s) does not necessarily mean ‘cutting off the hand(s)’. It could as well have a metaphorical meaning. Further, even if it were understood as amputation, Chapter 6 will demonstrate that *Shariah* provides ways and tools to allow for exceptions from such prescriptions, if this is necessary to adjust to the reality of life and to protect the benefit of the people.

v. Fighting against Allah and His Messenger (*haraba*)

The significance of the influence of Islamic jurisprudence is perhaps best illustrated in respect of the crime of *haraba*. This crime is probably the one that results in the harshest of all the punishments within the framework of *hudud* ordinances, and the harshest mentioned in the

⁴⁴⁷ *Sunan Abi Dawud* (2010) vol 3 at 822; *Sunan at-Tirmidhi* (1977) vol 3 at 564.

⁴⁴⁸ Abu Zayd op cit note 239 at 420.

⁴⁴⁹ Ibid.

⁴⁵⁰ Surah 2:280.

⁴⁵¹ Imam Qurtubi, in his commentary of this verse, stated that the majority of scholars support this interpretation. *Tafsir al-Qurtubi* (2006) vol 4 at 415–16.

entire Qur'an, for the assigned punishment is 'execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land...' (Surah 5:33). These are extremely cruel, inhuman and degrading penalties and thus violate international human rights laws.⁴⁵² However, these extremely harsh penalties have to be seen in their context and in relation to the crime that they are meted out for, namely for actions that can be considered acts of war.⁴⁵³ Surah 5:33 assigns these harsh punishments to those who 'wage war against Allah and His Messenger, and strive with might and main for mischief through the land'.... The Qur'an interpreters explain that this speaks of physical action, such as war waged with weapons, in which killing and robbery takes place.⁴⁵⁴ In other words, the crime of *haraba* refers to acts of war against a Muslim nation and to acts of physical violence harming the safety of the public, hence, acts reflecting a high criminal energy on the part of the offender. This can explain the harshness of the punishment. When the life example of the Prophet Muhammad is looked at to see when he applied this punishment, it can be seen that he used this harsh punishment only once, namely in his conflict with the Jews of Medina, more specifically the tribe of Beni Qurayza, who had declared war against the Prophet Muhammad and his followers.⁴⁵⁵ Al-Alwani points out that the reason why the Prophet chose this kind of punishment is that it was one that was being applied amongst the Israelites at that time.⁴⁵⁶ It can be argued, thus, that the Prophet chose to beat his enemy at their own game. It is noteworthy, that this was the only historical incident that the Prophet used that punishment. It can be argued, therefore, that this kind of punishment can be applied, if at all, only in very exceptional situations, such as war against a Muslim nation. Hence, the cases that these very harsh and cruel punishments can be imposed are quite limited.

The main problem with this *hudud* prescription is that Islamic jurists have extended the definition of the crime to include any act or statement that can insult or bring harm to Allah or His Messenger, to Muslims or to Islam.⁴⁵⁷ This extended definition has opened a wide field of human rights violations, for it includes even any statement critical of Islam. The following two statements demonstrate just how widely the crime of *haraba* is interpreted by Islamic scholars.⁴⁵⁸ Ibn Taymiyyah declares: 'If anyone said that the robe of the Prophet is dirty, telling that to insult the Prophet, he has to be killed.' Imam Ahmad has asserted that:

⁴⁵² UDHR (art 5), ICCPR (art 7), CAT (art 2 para 1).

⁴⁵³ *Tafsir Ibn Kathir* (1999) vol 3 at 96.

⁴⁵⁴ Al-Ashmawy op cit note 409.

⁴⁵⁵ Al-Alwani op cit note 111.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibn Taymiyyah op cit note 381 at 421.

⁴⁵⁸ Ibid.

‘Anyone, [whether] Muslim or infidel, who curses the Prophet or belittles him, has to be killed and has no option of repentance.’⁴⁵⁹ This very wide definition of the crime of *haraba* violates the freedom of opinion and the freedom of expression, and leads to the fact that the harsh *haraba* punishment will no longer be limited to cases of very severe physical attacks against a Muslim nation or its public safety, but will be applied even in cases such as the one of the Danish cartoonist who drew a disrespectful image of the Prophet.⁴⁶⁰ The widening of the definition of the crime of *haraba* has opened the door for a terrible abuse of the harsh *haraba* punishment, and makes it easy for radical Islamic groups to justify all kinds of violence and atrocities against whoever they consider enemies of Islam, even if it is just because of statements, literature or films critical of Islam.

A second problem caused by Islamic jurists is the fact that they developed many different and, at times, contradictory *hadd* definitions in relation to the crime of *haraba*.⁴⁶¹ Sometimes it is not even clear to which of the qur’anic verses they refer. The definitions range from ‘highway robbery’ or ‘armed robbery’ and ‘rape’ to ‘rebellion’, all mixed up at times with the crime of ‘apostasy’. Al-Alwani has complained of the great confusion that has been created by the jurists, and wondered how they came up with the idea to mix the crime of *haraba* with apostasy and rebellion.⁴⁶²

The striking contradictions between *Shariah* and the interpretations of Islamic jurisprudence, mentioned above, are usually completely ignored in the international debate about the violations of human rights in Muslim countries. It is due to this fact that there is great confusion, both in the west as well as in the Islamic world. Human rights’ experts wrongly claim that *Shariah* is the main source of the conflict;⁴⁶³ and orthodox Muslims wrongly defend *hudud* ordinances as divine and infallible, claiming that the set of *hudud* crimes and punishments have been divinely prescribed in the *Shariah*.⁴⁶⁴

⁴⁵⁹ Ibid.

⁴⁶⁰ Saad al-Ajmi ‘Daiyah Islami kuiti jusder fatwa bi hadr dem rasam al-karikater al-Danamarki’ *Al-Riyadh* 2 February 2006 no 13737, available at <http://www.alriyadh.com/127563>, accessed on 11 November 2015.

⁴⁶¹ Al-Alwani op cit note 111.

⁴⁶² Ibid.

⁴⁶³ Heiner Bielefeldt ‘“Western” versus “Islamic” human rights conceptions? A critique of cultural essentialism in the discussion on human rights’ in (2000) 28 (1) *Political Theory* 90–121, available at <http://www.jstor.org/stable/192285>, accessed on 4 January 2015.

⁴⁶⁴ Abdul Rahman Abdul Khaliq *Wejub Tatbiq al-Hudud al-Shariah* (1984) 24.

(d) The different Muslim positions towards *hudud* ordinances and human rights

i. The orthodox Muslim view — defending *hudud* ordinances and rejecting reforms

Orthodox Muslims defend *hudud* ordinances and reject any attempt of reformation.⁴⁶⁵ They argue that Islam proposes a society of justice and that criminal behaviour, therefore, cannot be tolerated, especially since it is viewed as violating God's sovereignty.⁴⁶⁶ They stress the importance of securing a peaceful social life by protecting society from criminals.⁴⁶⁷ They argue that in order to prevent crimes from occurring, severe punishments are justified and necessary for the purpose of deterrence.⁴⁶⁸ This confidence in the effectiveness of *hudud* punishments as a deterrence has become a deeply-held conviction of orthodox Muslims. This is particularly so since the punishments are believed to have been divinely ordained and designed by Allah as a measure of deterrence.⁴⁶⁹ Questioning the allegedly divinely ordered *hudud* punishments is therefore considered a questioning of the underlying divine wisdom that they are based on and thus a denial of the divinity of the Qur'an.⁴⁷⁰ Human rights activists, who call for an abolition of *hudud* ordinances, unsurprisingly are viewed by orthodox Muslims as blasphemers.⁴⁷¹ This is particularly so since they see human rights as universal and thus superior to what orthodox Muslims consider divine revelation.⁴⁷² The belief of human rights activists that human judgment could determine whether a punishment decreed by God is appropriate or not, is considered to contradict the Islamic theocentric worldview, particularly since *Shariah* is considered to be infallible and superior to any human-made law, including international human rights laws.⁴⁷³ Orthodox Muslims would never consider subordinating their *Shariah*-based laws to international human rights laws or to bow to the pressure of human rights activists, whose views are known to be based on humanistic thinking.⁴⁷⁴ It is for this reason that orthodox Muslim scholars usually reject any

⁴⁶⁵ Kstas Ibrahim al-Naimi 'Al-hudud al-shari'a fi al-Islam' *Jameat Aleman* 27 January 2013, available at http://www.jameataleman.org/main/articles.aspx?article_no=1758, accessed on 3 January 2015.

⁴⁶⁶ Okon op cit note 67.

⁴⁶⁷ Ibid.

⁴⁶⁸ Al-Otaibi op cit note 47 at 174.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ismail op cit note 9 at 7; Abdul Rahman Abdul Khaliq *Wejub Tatbiq al-Hudud al-Shariah* (1984) 24.

⁴⁷¹ Al-Zoheily op cit note 8; Ismail op cit note 9 at 7.

⁴⁷² Ibid.

⁴⁷³ Al-Qaradawi op cit note 8.

⁴⁷⁴ Ibid.

approach to reform Islamic criminal law as an attempt to sabotage with the aim of demolishing their fundamental religious and moral principles.⁴⁷⁵

Orthodox Muslims seem to completely ignore the realities of life, and the developments and changes that have taken place in the Muslim society over time, including the changing ways of people's lives. They also neglect the principle of *ijtihad* and the use of logic, and fail to recognise that universal human rights can be in agreement with *Shariah*.

ii. Secular Muslim view — calling for the separation of religion and state

Secular Muslims care very much about the realities of life, about human rights and about the gift of logic and common sense.⁴⁷⁶ They believe that using human logic and common sense is the best way to lead a society towards a healthy development.⁴⁷⁷ Accordingly, they view human rights as a product of human logic.⁴⁷⁸ Secular Muslims promote the separation of religion and state and reject codifying and applying Islamic law, including the *hudud* ordinances.⁴⁷⁹ They view religion as a bad dogma, which dictates and abuses people by using the name of God.⁴⁸⁰

The renowned Arabic secular writer Khalil Abdel-Karim is one of the voices advocating the separation of state and religion.⁴⁸¹ Abdel-Karim points out to the strong influence that pre-Islamic Arabic traditional law had on the Islamic teaching as presented in the Qur'an and practiced by Muhammad.⁴⁸² He concludes that this is why Islamic law that might have been suitable to a society of the seventh century does not fit with that of the twenty-first century.⁴⁸³

Orthodox Muslims reject this secular view completely and would not even consider as Muslim a person who holds this kind of opinions.⁴⁸⁴

⁴⁷⁵ Al-Zoheily op cit note 9; Ismail op cit note 9 at 7.

⁴⁷⁶ Khalil op cit note 55 at 423.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Saleh Bin Muhammad Bin Umar al-Dimeji *Mawqif al-Libraliyah fi al-Bilad al-Arabiyyah min Muhakimat Addin* (2011) 793; Zakaria op cit note 58 at 157.

⁴⁸⁰ Zakaria op cit note 58 at 141.

⁴⁸¹ Karim's work focuses on a critical study of Islam as a religion and system, giving special attention to social and economic issues.

⁴⁸² Khalil op cit note 57 at 423.

⁴⁸³ Ibid.

⁴⁸⁴ Mansour Obahafy *Al-Elmaneun wa Ansanat al-Quran* (2010) 75.

iii. The moderate Muslim position — striving to build bridges

Moderate Muslims including members of the Sufi movement⁴⁸⁵ view human rights as being part of the Islamic teaching, even though Islamic holy texts do not speak about them as explicitly as universal human rights laws do.⁴⁸⁶ They consider *Shariah* as the perfect divine constitution that, if interpreted and applied correctly, can lead to a good level of compliance with international human rights laws.⁴⁸⁷ They view Islamic jurisprudence as being responsible for the conflict between Islamic law and international human rights laws.⁴⁸⁸ In their opinion, Islamic scholars and jurists do not pay the necessary attention to the requirements and challenges of modern life and society.⁴⁸⁹

Most moderate Muslims, therefore, support and promote attempts to reform Islamic law, for example, by filtering the rules and regulations of Islamic law and/or by re-interpreting the primary, secondary and subsidiary sources of *Shariah*, using the concept of *ijtihad* to make Islamic law relevant to our current context.

The Egyptian, Gamal al-Banna, for example, proposes to sift the *Sunnah* using a specific guideline based on the Qur'an.⁴⁹⁰ He suggests that any report that is in conflict with human rights and freedom of religion or one that insults or belittles women should be rejected.⁴⁹¹ The famous Sudanese scholar, An-Na'im, views the shift in the content of the Islamic message from the qur'anic legislation of Mecca to the one of Medina as one of the main reasons why Islamic law violates some of the most fundamental international human rights.⁴⁹² He, therefore, stresses the importance of understanding the Qur'an and *Sunnah* in their historical context.⁴⁹³ The famous Libyan writer, al-Sadiq al-Nayhum, considers contemporary Islam a

⁴⁸⁵ The Islamic mystical Sufi movement interprets Islam from the spiritual, religious perspective rather than from a legal or secular one. For example, they consider 'getting drunk' as enabling a deeper relationship with God. See Al-Awadi, Adnan Hussein *Al-Sufi hata auful madrasat Baghdad wa zuhur al-Ghazali* (1967) 199.

⁴⁸⁶ Fade Kalhus 'Al-Islam wa huquq al-insan' (2006) *Al-Hewar al-Mutamaden*, available at <http://www.ahewar.org/debat/show.art.asp?aid=67165>, accessed on 20 May 2015.

⁴⁸⁷ Saad al-Din al-Hilali 'Gamal al-Islam fi istiqlal wa horiat al-insan' *Rose al-Yusuf Magazine* 20 July 2013, available at <http://www.rosa-magazine.com/News/4751/>, accessed on 13 July 2015.

⁴⁸⁸ Abdulah Bin Ali al-Alyan 'Darurat al-tajdid al-feqhi wa al-deni' *Al-Sharq* 5 April 2015, available at http://www.al-sharq.com/news/details/324513#.VaQC0ltX_dk, accessed on 13 July 2015.

⁴⁸⁹ Muhammad Abu al-Taher 'Al-khitab al-fiqhi al-Islami: Beina lahotiyat al-tajdid wa darurat al-tafkik' *Al-Hurriyat* 7 September 2014, available at <http://www.hurriyatsudan.com/?p=162837>, accessed on 13 July 2015.

⁴⁹⁰ Gamal al-Banna *Tajrid al-Bukhari wa Muslim min al-Ahadith al-Latti le-Tulzem* (1997) 13.

⁴⁹¹ Al-Banna op cit note 399 at 14.

⁴⁹² An-Na'im op cit note 53 at 9, 55 & 158.

⁴⁹³ After the Prophet Muhammad's flight from Mecca to Medina (in the *hijra*), the Prophet changed his message from one that in his first years used to be quite tolerant and peaceful and adapted to the time and circumstances in Medina. In response to the socioeconomic and political realities in Medina, he abrogated and repealed several elements of the earlier, peaceful message. Among the new message of Medina are, for example, texts that are the basis of discrimination against women and non-Muslims. It can be argued that these changes were necessary

corrupted form of Islam, one created by the Muslim jurists whose interpretations misrepresent the true Islam and lead to the abuse of Muslim women.⁴⁹⁴ Al-Nayhum, therefore, calls for a return to the original Islam, preached and practiced by the Prophet Muhammad himself.⁴⁹⁵ The Swiss Muslim scholar, Tariq Ramadan, the grandson of the Egyptian founder of the Muslim Brotherhood Hassan al-Banna, went one step further, declaring *hudud* punishments as an invention of Islamic scholars.⁴⁹⁶ His article titled ‘Stop, in the name of humanity’,⁴⁹⁷ in which he called publicly to put a moratorium on *hudud* penalties, has been the subject of harsh criticism from conservative Muslims.⁴⁹⁸

Most of the previously mentioned moderate Muslims, though, are completely loyal to *Shariah* and are driven by a sincere desire to renew the true teaching of Islam. Sadly, they and their views face much rejection from orthodox Muslims.⁴⁹⁹ An-Na’Im, who is one of the most famous moderate scholars of Islam and human rights, has also often been harshly criticised by conservative Muslims.⁵⁰⁰ His is one of the voices promoting the universality of human rights. He stresses that, despite the secular western origins of human rights defined by the UDHR, human rights indeed are truly universal.⁵⁰¹ He justifies his claim by pointing to the fact that ‘the moral or philosophical foundations and political justification of the conception of human rights as defined by the UDHR can be found in different religious and cultural traditions’.⁵⁰² An-Na’Im even sees some common ground between Islamic law and the human rights laws and points out that ‘the historical formulations of *Shariah* provided a protection for certain human rights’. He notes the Muslim claim that: ‘[H]istorical formulations of *Shariah* have always secured human rights in theory, though such a situation may not have materialized in practice.’⁵⁰³

only temporarily at that time, due to the given circumstances, and that they are not to be seen as a final or conclusive repeal of the earlier texts.

Abdullahi Ahmed An-Na’Im ‘Translators’ introduction’ in Mahmoud Mohamed Taha *The Second Message of Islam*, Syracuse University Press, 1987.

⁴⁹⁴ Al-Nayhum op cit note 56 at 103 & 229.

⁴⁹⁵ Ibid at 51.

⁴⁹⁶ Ramadan op cit note 54.

⁴⁹⁷ Ibid.

⁴⁹⁸ Tariq Dalouani ‘Tariq Ramadan wa dawatoho le taleq al-hudud’ 31 March 2005 *Majalat al-Asser*, available at <http://alassr.me/articles/view/6504>, accessed on 17 April 2016.

⁴⁹⁹ Ahmed Host Faqihi ‘Hakaza takalama Nasr Hamed Abu Zeyd’ *Okaz Newspaper* 13 July 2010, available at <http://www.okaz.com.sa/new/issues/20100713/Con20100713361289.htm>, accessed on 4 January 2015.

⁵⁰⁰ George Packer ‘The moderate martyr: A radically peaceful vision of Islam’ *The New Yorker* 11 September 2006, available at <http://www.newyorker.com/magazine/2006/09/11/the-moderate-martyr>, accessed on 4 January 2015.

⁵⁰¹ Abdullahi Ahmed An-Na’im *Islam and Human Rights: Beyond the Universality Debate* (2000) 98.

⁵⁰² Ibid.

⁵⁰³ Ibid.

The Jordanian scholar, Marwan Ibrahim Qaisi, like An-Na'im, attempts to build a bridge between Islam and human rights by promoting an understanding of human rights that corresponds to international human rights laws yet is based on *Shariah*.⁵⁰⁴ He, however, goes somewhat further by declaring that the universality of human rights and equal dignity for all mankind can be based on the Qur'an.⁵⁰⁵ He stresses that '[h]uman dignity is the cornerstone of the human rights topic' and that 'human rights in Islam derive from that great element'. In so doing, he refers to Surah 17:70 that says that Allah has 'honoured the sons of Adam' and explains that:

[T]reating someone unjustly is violating his human dignity and if the human dignity of a person has been violated, his human rights are violated. This gift of dignity is shared by the entire human race without distinction by their beliefs, colours, culture, age or social position.⁵⁰⁶

Those Muslims, who have stayed loyal to their community and their religious inheritance, can be seen as the biggest hope for reformation in the Islamic world. These are the Muslims who strive to help the Muslim community and the rest of the world by building bridges of common understanding. This is also what al-Gharbawi concluded from his study of the difficulties that hinder reformation in the Islamic world. He puts his hope in those Muslims who are willing to modernise, but not necessarily westernise.⁵⁰⁷

What most of these moderate Muslims have in common is an understanding that the cause of the conflict between the Islamic world and international human rights is not with *Shariah*, but with Islamic jurisprudence.

III Conclusion

Human rights are considered to be derived from the inherent dignity of the human person. Consequently, everyone is entitled to the same rights and freedoms, without distinction of any kind, such as race, colour, sex, language or religion. This is the widely accepted understanding of human rights, as recorded in the UDHR and other international human rights documents. Despite the fact that these human rights documents were written as recently as within the past century, it can still be argued with confidence that human rights are universal, since the notion of human rights can be traced back over thousands of years and can be found in different times and religions.

⁵⁰⁴ Al-Qaisi op cit note 55 at 11.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ Al-Gharbawi op cit note 14 at 89.

Nevertheless, human rights are still facing great challenges today. The notion of their universality, which is one of the most basic characteristics of human rights, is often challenged, especially by orthodox Muslims who view international human rights laws as a western liberal product and an assault on the Islamic identity. Interestingly, orthodox Muslims stress, at the same time, that Islam promotes human rights, namely by protecting the five indispensables. This claim, however, can actually be seen as supporting rather than refuting, the notion of universality. In fact, *Shariah* can indeed be seen as protecting human rights, since the Qur'an promotes several human rights that can be compared to those internationally protected, as will be further discussed in Chapter 5. These commonly shared human rights include justice and human dignity, the right to life, property and privacy.⁵⁰⁸

Nevertheless, the Muslim orthodox understanding of Islam and Islamic law contradicts to the core several of the basic human rights principles protected by international human rights laws — especially the principles of equality, freedom of thought, conscience and religion, as well as the protection from bodily harm and torture. The greatest challenge to human rights in the Islamic world is Islamic criminal law — especially *hudud* ordinances as developed by Islamic jurisprudence, for they violate international human rights principles in many ways. This, to a great extent, is due to their cruel, inhuman and degrading punishments that are outlawed by international human rights laws. *Hudud* ordinances also discriminate against women and non-Muslims and violate freedom of religion, opinion and expression, as well as principles of due process and fair trial.

Interestingly, both human rights activists and orthodox Muslims usually point to *Shariah* as the main reason for the conflict. Human rights activists view *Shariah* as the main obstacle and source of human rights violations in Muslim countries, while Muslim countries often object to international human rights law based on alleged contradictions to *Shariah*. Both sides, however, are not fully correct in this regard, as the main obstacle is not *Shariah*, but the rulings and prescriptions developed by Islamic jurisprudence. Notably, the most critical *hudud* prescriptions that clash significantly with international human rights are not based on the Qur'an or the correct *Sunnah*, but on the interpretations of Islamic jurists that cannot be considered divine or non-negotiable since they are based on human understanding.

Orthodox Muslims, however, defend *hudud* ordinances and claim that are divine and thus non-negotiable — a claim that has already been refuted in the previous chapter — and they employ the argument of the deterrent function of harsh punishments.

⁵⁰⁸ See ch 5 (I) (b) for Islamic legal source; international human rights laws: UDHR arts 1,2,12 &17; ICCPR arts 3, 4 & 6; CEDAW art 3; ICESCR art 7 & 2 (2).

Secular Muslims, on the contrary, are critical of religion and thus call for a moratorium on *hudud* ordinances, something that for orthodox Muslims is not an option at all.

Many moderate Muslims acknowledge that there is a great need to do something about the conflict of *hudud* ordinances with human rights, while at the same time they are fully loyal to *Shariah* and acknowledge it the perfect divine constitution. They believe that if interpreted and applied correctly, *Shariah* can lead to a good level of compliance with international human rights laws. These moderate Muslims call for a re-interpretation of the primary, secondary and subsidiary sources of *Shariah* to make Islamic law relevant in the contemporary context. Despite their loyalty to *Shariah*, these moderate Muslims usually suffer rejection by orthodox Muslims. Even distinguished Muslim writers have been easily labelled by conservative Muslims as renegades and neo-colonialists.

If devout Muslims with a sincere desire to renew the true teaching of Islam are criticised so harshly, simply because they try to reconcile Islamic law with international human rights law, it is logical that it will almost be impossible for human rights activists or organisations (especially the non-Muslim ones) to convince or force conservative Muslims to adhere to standards of international human rights laws. This is why it is so important that efforts to solve the conflict of *hudud* ordinances with international human rights standards come from inside Muslim society and, most importantly, that the orthodox Muslims' arguments are taken seriously and responded to appropriately. It is for this purpose that this thesis presents an approach that aims at resolving the conflict, taking the conservative views very seriously and trying to develop a way of settling the conflict based on arguments that are fully loyal to *Shariah*.

CHAPTER 4

HUDUD ORDINANCES ACCORDING TO THE FOUR SUNNI SCHOOLS OF JURISPRUDENCE

I Introduction

This chapter discusses the *hudud* ordinances according to the four main Sunni schools of jurisprudence, namely the Hanafi, Maliki, Shafei and Hanbali schools.⁵⁰⁹

⁵⁰⁹ Whilst all four schools agree on the basic fundamental teachings, differences concerning secondary issues can be found.

The first part of the chapter discusses the legal prescriptions of *hudud* ordinances according to the four Sunni schools. The section starts by pointing out the different views as to which crimes should be considered to be part of *hudud* ordinances. Interestingly, the four schools disagree on the exact number of crimes to be part of the set of *hudud* ordinances, even though they all share the understanding of *hudud* ordinances as a specific and perfect set of divinely prescribed crimes and punishments.⁵¹⁰ While the Hanafi school believes that the set of *hudud* ordinances consists of five *hudud* crimes and their punishments, the Shafei school holds to seven crimes, and the Maliki school to eight. Amongst Hanbali scholars different views are found. Some hold to seven crimes, others to only five. This chapter will, therefore, first give an overview of the differing lists of *hudud* crimes held by the four Sunni schools and explain the main reasons that led to the different views. It follows with a discussion of each one of the *hadd* crimes individually. The purpose of this is to compare the diverse views on the ordinances according to the four Sunni schools and explore the legal prescriptions articulated by these schools. A special focus will be on the different opinions and regulations concerning each crime's definition, the punishment meted out for it, and the legal requirements for a suspect to be convicted.

The chapter aims to demonstrate that there are so many different opinions held by the four Sunni schools — several of which even contradict the Qur'an — that the notion that *hudud* ordinances refer to a divinely prescribed and thus perfect and infallible set of punishments, can hardly be maintained. By exposing these weaknesses of the *hudud* ordinances, the chapter aims to demonstrate the necessity to amend and reform them.

The second part of the chapter looks at the practical application of *hudud* ordinances in the Muslim world. It starts by giving an overview over the development and the geographical distribution of the four Sunni schools.

It looks, then, at four representative countries that apply *hudud* ordinances fully in the entire country, namely Saudi Arabia that fully applies the Hanbali school of jurisprudence, Pakistan as a representative of the Hanafi school, Sudan that applies the Maliki school and Brunei Darussalam that has just started implementing *hudud* ordinances according to the Shafei school of jurisprudence. The focus will be on their national criminal law and the international concerns regarding human rights violations in these countries.

⁵¹⁰ Mohammed al-Zoheily *Al-Muatamad fi al-Fiqh al-Shafei* 3 ed (2011) vol 5 at 145.

II The legal prescriptions of *hudud* ordinances according to the four Sunni schools of jurisprudence

The number of *hadd* crimes that the four schools consider to be part of the set of *hudud* ordinances differs between five and eight. The five *hudud* crimes that the Hanafi school holds to are those that all four schools agree on, namely, illicit sexual intercourse (*zina*), defamation (*qazf*), theft (*sariqa*), drinking alcohol (*shurb al-khamr*) and highway robbery (*qata al-tariq*).⁵¹¹ The seven crimes that the Shafei school holds to, include, in addition, rebellion (*al-baghi*) and apostasy (*al-riddah*).⁵¹² The Maliki school adds an eighth crime, for it is the only school that considers fighting against Allah and His Messenger (*haraba*) as a *hadd* crime.⁵¹³ Within the Hanbali school there are divergent views, as some scholars consider rebellion and apostasy as *hudud* crimes, whilst others view them as *ta'zir* crimes. Accordingly, some of the Hanbali scholars hold to five *hudud* crimes, others to seven.⁵¹⁴

One of the main reasons for these differences is the confusing interpretations of the crimes of *haraba* (fighting against Allah and His Messenger), *qata al-tariq* (highway robbery) and *al-baghi* (rebellion). Some scholars even link apostasy and theft to the aforementioned crimes, by describing apostasy as a form of rebellion and comparing the crime of theft to highway robbery.

Interestingly, all four schools consider the crime of highway robbery (*qata al-tariq*) as a *hadd* crime, even though its legal justification is not as clear as the crime of fighting against Allah and His Messenger (*haraba*) that is listed as a *hadd* crime by only the Maliki school and some Hanbali scholars.

The reason for the confusion evolving around the use and definitions of the crimes of *haraba*, *qata al-tariq* and *al-baghi* is that they are all drawn from the same legal source, namely Surah 5:33. This assigns to ‘those who wage war against Allah and his Messenger, and strive with might and main for mischief through the land’ the punishment of ‘execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land’.

The first crime mentioned in that verse is ‘fighting against Allah and His Messenger’. The term *haraba* is derived from *yuharibuna*, meaning ‘those who fight’. *Harb* means war. This crime is therefore probably best interpreted as a ‘[d]eclaration of war against an Islamic

⁵¹¹ Al-Jaziri op cit note 190 vol 5 at 12–13.

⁵¹² Audah op cit note 186 at vol 1 at 79; Al-Jaziri op cit note 190 vol 5 at 12.

⁵¹³ Ibid at 12–13.

⁵¹⁴ Muhammad Bin Abdullah al-Hussein *Al-Zawaed fi Fiqh Imam al-Sunnah Ahmad Ibn Hanbal* (2012) 824; Majd al-Din Abi al-Barakat *Al-Muharrar fi al-Fiqh al-Hanbali* (1950) 163–4; Abdul Ghani al-Nabulsi *Hashiat al-Libdi ala na'il al-Maareb fi al-Fiqh al-Hanbali* (1999) 390.

state’,⁵¹⁵ or as referring to ‘acts of war’.⁵¹⁶ The background of this understanding was discussed in more depth in Chapter 2, where it was explained that some scholars widened the definition to ‘waging war against Allah and His Messenger by saying or deed’.⁵¹⁷ This definition includes any act or statement that can insult or bring harm to Allah or his Messenger, or to Islam, or to Muslims.⁵¹⁸ Widening the definition of the crime of *haraba* to this extent gives it a completely new dimension, especially when considering the extremely harsh and cruel punishments assigned for it.

The second part of the crime described in the above verse speaks of those ‘who strive with might and main for mischief through the land’ (Yusuf Ali translation) or ‘who ... spread corruption on earth’ (Muhammad Asad’s translation, usually closer to the original Arabic text than the popular Ali translation). It is on this part that the *hudud* crimes of highway robbery and rebellion are based. The Arabic text of the verse uses the term *yufsidun*, best translated as ‘people who spread corruption’.

The crime known as highway robbery (*qata al-tariq*) is based on the understanding of ‘those who ... strive ... for mischief through the land’. It is often defined as ‘going out to hijack the people, stealing their money or terrorising them or killing them publicly by use of force’,⁵¹⁹ or as the rebellion of armed groups or individuals against the Muslim society by causing chaos and bloodshed of the innocent, including robbery and rape.⁵²⁰

The Arabic term *qata al-tariq*, which translates as highway robbery, is not found in Surah 5:33, but derives from Surah 29:29:

Do ye indeed approach men, and cut off the highway?- and practise wickedness (even) in your councils?’ ... ‘Bring us the Wrath of Allah if thou tellest the truth.

Even though the name of the crime is not used in Surah 5:33, the punishments assigned for highway robbery are those given in Surah 5:33.⁵²¹ Given that all four schools list *qata al-tariq* as a *hadd* crime and assign for it the punishment of Surah 5:33, they apparently agree that the above verse in Surah 29:29 speaks of the same crime as that mentioned in Surah 5:33.

The crime of rebellion (*al-baghi*) is based on the same text of Surah 5:33, particularly on its reference to ‘spreading corruption on earth’.⁵²² This is usually defined as rebellion against

⁵¹⁵ Okon op cit note 67 at 229.

⁵¹⁶ *Tafsir Ibn Kathir* (1999) vol 3 at 96.

⁵¹⁷ Jumah op cit note 223 at 139; Bahram al-Dumeri *Al-Shamel fi Fiqh al-Imam Malik* (2008) 942–5.

⁵¹⁸ Ibn Taymiyyah op cit note 381 at 421.

⁵¹⁹ Muhammad Amin Ibn Abidin *Rad al-Mehtar ala al-Dur al-Muhtar* (1992) vol 5 at 183–4.

⁵²⁰ Mustafa al-Hin, Mustafa al-Bugha and Ali al-Shurbagy *Al-Fiqh al-Manhaji* (1992) vol 8 at 82; Ali Bin Suleman al-Merdawi *Al-Ensaf fi Marefat al-Rajah min al-Kilaf* (2004) vol 1 at 1764.

⁵²¹ Okon op cit note 67 at 234.

⁵²² *Ibid* at 229.

the imam (or his assistants or his governors), whether from lacking submission or disobeying him.⁵²³ Some scholars describe the rebellion as not just referring to the imam, but ‘against constituted authority [that can be] either a political leader or economic order’.⁵²⁴ This understanding is less common and significantly wider than the first.

Again, the name of the crime, *al-baghi*, does not derive from Surah 5:33 but from a different verse, namely Surah 49:9, one that calls on conflicting parties to solve their conflicts peacefully if possible:

If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair (and just).

The term *al-baghi* (rebellion) comes from *bagha*, a word that refers to ‘transgress beyond bounds’. In contrast to highway robbery, the crime of rebellion refers to physical attacks motivated by hermeneutic reasons, ie due to disagreement on interpretations of religious texts. The struggle of the group of Khawarij, who fought against the fourth caliph Ali Ibn Abi Talib because of religious and political disagreement, is a good example for such an act of rebellion. The punishment assigned for the crime of rebellion is the same as the one for highway robbery, namely the one described in Surah 5:33.

Since the three crimes of *haraba*, highway robbery and rebellion share the same legal basis and the same punishment, and especially since their definitions greatly overlap, it is not quite comprehensible as to why the Islamic jurists have defined them as three different crimes. They are so closely connected to each other that it is almost impossible to identify exact distinct definitions, as can be seen below.

It can be argued that the crime of *haraba* includes both *qata al-tariq* (highway robbery) and *al-baghi* (rebellion). This can be justified by the aforementioned understanding of *haraba* as waging war against the Muslim society⁵²⁵ including any act that harms or aims to destroy the state or to undermine the structure of the state or society, including threatening the public safety and order by using violence, killing and rape.⁵²⁶

It is due to these overlapping definitions of the three crimes that the penal codes of the four countries discussed in this chapter use the terms in such a confusing way. Pakistan⁵²⁷ and

⁵²³ Al-Jaziri op cit note 190 vol 5 at 368.

⁵²⁴ Okon op cit note 67 at 229.

⁵²⁵ Al-Hin, Al-Bugha & Al-Shurbagy op cit note 520 at 82; Al-Merdawi op cit note 520; Okon op cit note 67 at 234.

⁵²⁶ Al-Ashmawy op cit note 409.

⁵²⁷ Council of Islamic Ideology ‘Hudud Ordinance 1979’ 151, available at <http://cii.gov.pk/publications/h.report.pdf>, accessed on 1 July 2015.

Brunei, for example, include robbery in their list of *hudud* crimes, but call it *haraba* — Brunei calls it *hiraba*. Pakistan lists the crime of rebellion separately; Brunei does not include rebellion in its list of *hadd* crimes. The Saudi⁵²⁸ and the Sudanese penal codes⁵²⁹ list *haraba*, *qata al-tariq* and *al-baghi* separately.

In the following section, the *hudud* crimes will be discussed individually, exploring and comparing the different views and opinions of the four Sunni schools of jurisprudence, especially concerning their definitions, requirements for conviction and punishments.

(a) Illicit sexual intercourse (*zina*)

The *hadd* crime of illegal sexual intercourse is based on Surah 17:32 and 24:2. The two verses speak of the crime of *zina*, usually translated as ‘adultery and fornication’. Islamic scholars usually speak of ‘adultery’ when referring to extra-marital sex between married persons and of ‘fornication’ when referring to sexual intercourse between those who are not married. It is important to note that such differentiation cannot be found in the Qur'an. The relevant two qur'anic verses speak only about one crime, namely *zina*, and prescribe one specific punishment for it, namely flogging with 100 lashes. In contrast to this qur'anic text, Islamic jurists assigned different punishments depending on whether the crime is committed by a married or unmarried person. All four Sunni schools agree on the punishment of stoning to death for adultery between married persons, and flogging with 100 lashes and a year in exile for illicit sexual intercourse between unmarried persons.⁵³⁰

The Hanbali school believes that for a married adulterer both punishments, namely flogging and stoning, should be combined. According to them, the flogging with 100 lashes should be carried out on the first day, and on the second day the convict should be stoned to death.⁵³¹ The Maliki,⁵³² Shafei⁵³³ and Hanafi⁵³⁴ schools, by contrast, reject combining flogging and stoning, since they believe that the stoning sentence abrogates flogging.

The Shafei and Hanbali schools agree that unmarried convicts should be exiled for a year after the flogging.⁵³⁵ The Maliki school agrees to banish male offenders, whilst they reject

⁵²⁸ Shaima Atta ‘Criminal law in Saudi Arabia’ *Qatar Law Forum* 19 February 2010, available at <http://www.mn940.net/forum/forum29/thread8833.html>, accessed on 23 December 2015.

⁵²⁹ Al-Jaziri op cit note 190 vol 5 at 12&13.

⁵³⁰ Muhammad Bin Framuz al-Hanafi *Al-Durar al-Hikam fi Gurar al-Ahkam* (2008) vol 2 at 63.

⁵³¹ Al-Jaziri op cit note 190 vol 5 at 60.

⁵³² Abdulalah Bin al-Jalab al-Basri *Al-Tafriyah* (1987) vol 2 at 221–4.

⁵³³ Ismael al-Masri al-Mazni *Muktasar al-Mazni fi Ferua al-Shafieyah* (1998) 342.

⁵³⁴ Muhammad Amin Ibn Abidin *Al-Dur al-Mukhtar Shariah Tanweer al-Absar* (2003) vol 6 at 5-53.

⁵³⁵ Al-Jaziri op cit note 190 vol 5 at 61.

exile for female offenders, since they believe that women could be led astray during exile.⁵³⁶ The Hanafi school rejects the punishment of exile completely, since is not mentioned in the Qur'an, and the only legal basis for this practice is a weak *hadith (hadith ahad)*.⁵³⁷

In cases in which a married person commits adultery with someone who is single, the schools disagree as to the sentence. The Shafei⁵³⁸ and Maliki⁵³⁹ schools say that only the one who is married (*muhsan*) should be stoned to death, whilst the one who is not married should not be stoned but flogged with 100 lashes.⁵⁴⁰ In other words, according to the Shafei and Maliki schools, each one will be punished according to his own crime and circumstances. The Hanafi⁵⁴¹ and Hanbali⁵⁴² schools, by contrast, hold that the punishment of stoning should be applied only if both parties are married. If one is not married, neither of them should be stoned, but both should be flogged with 100 lashes.

The question as to whether or not the death penalty by stoning should be meted out on non-Muslims also depends greatly on the definition of the term *muhsan*.⁵⁴³ Islamic jurists usually use the term as referring to married in contrast unmarried. The term is used in Surah 5:5 in its description of what kind of woman is lawful for a Muslim. Here, the term *muhsan* refers to a chaste (*muhsana*) woman, in the sense of a woman who does not commit adultery or fornication.⁵⁴⁴ The four schools disagree on whether a non-Muslim can be considered *muhsan*. Whilst the Hanafi and Maliki schools hold the opinion that only Muslims can be considered *muhsan*,⁵⁴⁵ according to the Shafei and Hanbali schools, non-Muslims can be also considered *muhsan*.⁵⁴⁶ Consequently, according to the Hanafi and Maliki schools, non-Muslims will never be stoned for adultery, since they are not considered *muhsan*. The Hanbali and Shafei schools, however, enforce stoning, even on non-Muslims. Enforcing *hudud* ordinances on non-Muslims also can be seen as a violation of religious freedom.

⁵³⁶ Al-Qadi Abdul Wahab al-Bagdadi *Al-Ma'una ala Mazhab al-Imam Malik* (1995) 1374.

⁵³⁷ Mahmud Bin Ahmad al-Aini *Al-Binayah fi Sharh al-Hidayah* (1990) vol 6 at 2237.

⁵³⁸ Yahya Ibn Sharaf al-Nawawi *Minhaj al-Talibin* (2005) 503–4.

⁵³⁹ Al-Dumeri op cit note 517 at 922–6.

⁵⁴⁰ Al-Jaziri op cit note 190 vol 5 at 56.

⁵⁴¹ Umar Bin Ibrahim Ibn Najm *Al-Naher al-Faq fi Sharh Kenz al-Daqaq* (2002) vol 3 at 135–43.

⁵⁴² Al-Maqdesi Ibn Qudamah *Umdat al-Fiqh fi al-Mazhab al-Hanbali* (2003) 136.

⁵⁴³ For a person to be considered *muhsan* several conditions have to be fulfilled. All four schools agree on five of them, namely that the person must have reached puberty, must be mentally sane and free (not a slave), that the marriage must have been consummated, and that there is a valid marriage contract. Al-Hin, Al-Bugha & Al-Shurbagy op cit note 520 at 64.

⁵⁴⁴ *Tafsir Ibn Kathir* (1999) vol 3 at 39.

⁵⁴⁵ Al-Jaziri op cit note 190 vol 5 at 56; Muhammad Asheq Elahi al-Berni *Al-Tasheel al-Daruri fi Massael al-Qaduri* (1991) vol 2 at 128.

⁵⁴⁶ Al-Jaziri op cit note 190 vol 5 at 56; Al-Berni op cit note 545.

The Shafei school assigns stoning on any married adulterer, whether Muslim or non-Muslim, independently of whether the other party is married or not. The Hanbali school assigns stoning on married adulterers, independently of whether they are Muslim or not, but only if both parties are married. So, even if both are non-Muslims they can be stoned. The Maliki school assigns stoning on all married Muslim adulterers, even if the other party is non-Muslim or single, and, according to the Hanafi school, stoning to death will be imposed only if both adulterers are married Muslims; in other words, if the other party is either single or non-Muslim, a married Muslim who is convicted of adultery will not be stoned.

The four schools disagree as to the punishment for Jews or Christians convicted of adultery or fornication. Since the Hanafi and Maliki schools do not acknowledge non-Muslims as *muhsan*, they argue, according to the aforementioned, that in the case of adultery committed by Jews or Christians, the punishment of stoning should not be applied. Instead they suggest the use of *ta'zir* punishments on convicted Jewish or Christian adulterers. This means that the imam or judge shall decide on the punishment.⁵⁴⁷ The Shafei and Hanbali schools, by contrast, believe that the punishment of stoning for adultery and flogging for fornication can be imposed on Jews and Christians also, but only if they agree to be judged by the Muslim leaders.⁵⁴⁸ This opinion is based on two *ahadith* that report that the Prophet carried out the punishment of stoning on the Jews following the prescriptions of the Torah/Taurat,⁵⁴⁹ thus their own religious law.⁵⁵⁰ The Hanafi and Maliki schools do not accept the aforementioned *ahadith* as a justification for the stoning of Jews and Christians. They argue that the cases mentioned in them took place after the Prophet's arrival in Medina from Mecca, thus at a time when the Prophet was commanded by Allah to apply the law of the Torah/Taurat.⁵⁵¹ They conclude that this no longer applies today.

All four schools agree that homosexuality is a punishable crime and the Shafei school believes that it should be treated as a *zina* crime. This means that a man, who is caught practicing homosexual acts, should be stoned to death if he is married; if he is not married, he should be flogged with 100 lashes. According to the Maliki and Hanbali schools, the two people who commit this act should be stoned to death, whether they are married or not. Only

⁵⁴⁷ Al-Hanafi op cit note 530.

⁵⁴⁸ Lamin al-Nagi *Al-Qadeam wal Jadid fi Fiqh al-Shafeai* (2007) vol 2 at 219.

⁵⁴⁹ The Taurat consists of the five books of Moses (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy) and is the main religious book of Jewish religion.

⁵⁵⁰ Suleman Ibn al-Ashas al-Sagestani *Sunan Abi Dawud* (2009) vol 6 at 494.

⁵⁵¹ Al-Jaziri op cit note 190 vol 5 at 114.

the Hanafi school does not consider homosexuality as being part of the *hadd* crime of *zina*, but as rather *ta'zir* crime.⁵⁵²

Concerning the practice of stoning, the four schools agree that the punishment of flogging should not be carried out on a very hot or very cold day, and that it shall not be carried out on a person who has a temporary sickness. The sick person should be given time to get well before the punishment is carried out.⁵⁵³ He or she shall be put in prison until well. The four schools agree, furthermore, that a man who is to be stoned shall not be tied up or put in a hole. Further, if he is able to escape, they should let him go. The woman, by contrast, is ordered to be put in a hole deep enough so that just her head is visible.⁵⁵⁴ It is argued that this is for her protection, so that neither her womb nor her chest is exposed.⁵⁵⁵ In effect, though, this practice is quite unjust, since women are given no chance to escape.

The evidence needed to convict a female suspected of adultery is acquired either by a personal confession or by the testimony of four male witnesses or by pregnancy.⁵⁵⁶ The personal confession is to be repeated four times according to the Hanbali school. The other schools consider a one-time confession sufficient to convict the suspect. The four schools agree that the four witnesses must have seen the actual penetration. They also agree that the testimony has to be delivered orally, not written or in another way.⁵⁵⁷ The Hanafi, Maliki and Hanbali schools require that the witnesses' testimonies be delivered at the same place during the same session; otherwise they will be considered having committed the crime of *qazf* (defamation).⁵⁵⁸ The Shafei school accepts the testimonies, even if they are delivered at different times or in different locations.⁵⁵⁹

If the witnesses contradict each other concerning where the crime took place, the Maliki and Shafei schools hold their testimonies shall not be accepted and no punishment shall be enforced due to the aspect of doubt.⁵⁶⁰ This reflects the presumption of innocence (*in dubio pro reo*),⁵⁶¹ which is an important principle in Islamic law. According to a famous statement of the Prophet Muhammad, recorded in a correct *hadith*, he said: '*Idra'u al-hudud bi al-*

⁵⁵² Abdulaah Bin Ahmad Bin Muhammad Ibn Qudamah *Al-Kafi* (1997) vol 5 at 370.

⁵⁵³ Ibn Mazah al-Bukari *Al-Muheat al-Burhani le Masael al-Mabsut* (2004) vol 6 at 390–453.

⁵⁵⁴ Al-Jaziri op cit note 190 vol 5 at 57.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ahmed Bin Ali Ibn Hajar al-Asqalani *Fath al-Bari fi Sharh Sahih al-Bukhari* (1986) vol 4 *hadith* 6442.

⁵⁵⁷ Al-Dumeri op cit note 517 at 922–6; Al-Nagi op cit note 548; Al-Maqdesi Ibn Qudamah op cit note 542.

⁵⁵⁸ Al-Bukari op cit note 553.

⁵⁵⁹ Al-Jaziri op cit note 190 vol 5 at 66–7.

⁵⁶⁰ Ibid at 68; Muhammad Bin Idris al-Shafei *Al-Um* (2001) 1227.

⁵⁶¹ Fabián Raimondo *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (unpublished PhD Thesis, Amsterdam Center for International Law (ACIL), 2007) 111.

shubuhāt (Avoid *hudud* in case of doubt).⁵⁶² Islamic jurists of the four schools agree on this general rule that in case of doubt a suspect cannot be sentenced. In reality, however, this important rule is often violated. The Hanafī and Hanbali schools, for example, do not see the contradictions of witnesses regarding where the crime took place as voiding the testimonies.⁵⁶³

If a woman accused of adultery is found to be a virgin, the accusations of witnesses will be dropped and the suspect will be free. Interestingly, in such a case the four schools agree that she will be released and the testimonies will be rejected, but the witnesses will not be accused of *qazf*.⁵⁶⁴ This is a clear case of sexual discrimination and a violation of the right and dignity of the woman, since the false accusation against her is not punished. It is also a violation of the qur'anic prescriptions of *qazf* that ban false accusations of women and declare it a punishable crime.

(b) Defamation (*qazf*)

The four Sunni schools of jurisprudence agree that the crime of *qazf* refers to falsely accusing someone of illicit sexual intercourse (*zina*). They agree that this includes defamation of adultery or fornication, homosexuality, or denying the fatherhood or motherhood of someone.⁵⁶⁵ Concerning the punishment for the crime of *qazf*, the four schools agree that the offender is to be beaten with 80 lashes if the victim is a free person and with 40 lashes if the victim is a slave.⁵⁶⁶

The four schools agree, further, that for the criminal offence of *qazf* to be fulfilled the accusation of *zina* has to be brought forth by a direct clear statement and by the free will of the offender.⁵⁶⁷ The offender has to be mentally sane and mature (having reached puberty) and also the victim has to be a mature and sane Muslim.⁵⁶⁸ He has to be of good moral standing, who has never been convicted of the crime of adultery before.⁵⁶⁹ In other words, a non-Muslim is not protected from defamation. This is a clear case of discrimination based on religion.

⁵⁶² Abu Isa Mohammad Ibn Isa al-Tirmidhi *Sunan at-Tirmidh* (2007) vol 3 at 208 *hadith* 1424.

⁵⁶³ Ibn Najm op cit note 541; Al-Merdawi op cit note 520 at vol 1 at 1727.

⁵⁶⁴ Al-Jaziri op cit note 190 vol 5 at 68; Abi al-Barakat op cit note 514 at 152–6; Al-Nawawi op cit note 538 at 503–4.

⁵⁶⁵ Al-Jaziri op cit note 190 vol 5 at 190.

⁵⁶⁶ Jumah op cit note 223 at 136.

⁵⁶⁷ Al-Hanafī op cit note 530 at 72.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

The four schools agree that the offender, ie the person who accuses someone of *zina*, has to prove his accusation by providing four witnesses.⁵⁷⁰ If the accuser is not able to provide the necessary witnesses, he has to be punished for the crime of defamation.⁵⁷¹ This prescription is based on Surah 24:4.

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) — flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors.

It is important to note, though, that this verse speaks only of the protection of women from being falsely accused of *zina*. The four Sunni schools, however, describe the crime of *qazf* in a gender neutral way. This interpretation is not justified by the Qur'an, and it can, in fact, be seen even as being in contradiction to it, for it is this interpretation that is responsible for, or at least contributes significantly to, the misuse of the verse in a way that can easily lead to the false conviction of innocent women, particularly of victims of rape. The problem is that if these prescriptions are used against a woman who was raped and who accuses her offender, she can easily end up being sentenced for the crime of *qazf* if she fails to provide four eyewitnesses. Due to the requirement to provide four eyewitnesses, who have seen with their own eyes the actual penetration, the attempt of a woman to prove her case is usually doomed to failure.

Concerning the number of witnesses, all four schools agree that if there are fewer than four, their evidence will be invalid. According to the Maliki school, not only will their testimony be rejected, but they will be considered to have committed the crime of *qazf* and will be punished with 80 lashes.⁵⁷² The Hanafi, Hanbali and Shafei schools, by contrast, agree that if there are less than four witnesses, their evidence will not be valid but they will not be accused of committing *qazf*.⁵⁷³

Women, non-Muslims or slaves are not considered as being qualified to be witnesses. This is another case of discrimination. All the four schools agree that if a witness turns out to be a non-Muslim, a slave or a woman, his or her testimony will be rejected, and he/she will be sentenced with the *qazf* punishment.⁵⁷⁴

⁵⁷⁰ Al-Jaziri op cit note 190 vol 5 at 195; Al-Maqdesi Ibn Qudamah op cit note 542.

⁵⁷¹ Muhammad Bin Al-Hanafi op cit note 530 at 72.

⁵⁷² Al-Jaziri op cit note 190 vol 5 at 196.

⁵⁷³ Al-Nawawi op cit note 538 at 505–6; Al-Merdawi op cit note 520 at vol 1 at 1736; Al-Hin & Al-Bugha & Al-Shurbagy op cit note 520 at vol 8 at 65.

⁵⁷⁴ Al-Jaziri op cit note 190 vol 5 at 207; Al-Nawawi op cit note 538 at 505–6; Al-Basri op cit note 532 at 225–6; Al-Bagdadi op cit note 536 at 1402.

If there are doubts as to the trustworthiness of the witnesses because they are known for their low moral standards,⁵⁷⁵ the Hanafi and Shafei schools agree that their testimony will be rejected, and the accusation will fall away. According to the Shafei school, the witnesses will be punished for committing the crime of defamation (*qazf*),⁵⁷⁶ while the Hanafi school does not require this.⁵⁷⁷ The Shafei prescription to punish such a witness just because he is not considered trustworthy, without any proofs that his accusations were false, violates the presumption of innocence.

The majority of the Sunni scholars agree that the punishment for the *hadd* of *qazf* will be enforced only if the victim requires so. If the victim of the false accusations dies before the punishment is carried out, the Shafei and Hanbali schools say that the relatives of the victim inherit the right to demand the punishment of the offender.⁵⁷⁸ The Hanafi school, however, rejects this view and believes that if the victim dies the accuser will be free.⁵⁷⁹ This provision, however, violates justice and runs the risk that a person who was convicted of *qazf* might try to kill his victim in order to escape the punishment.

(c) Theft (*sariqa*)

All four Sunni schools agree on the traditional definition of theft as introduced in Chapter 2, namely, ‘stealing something that belongs to someone else from a locked place (*herz*)’.⁵⁸⁰

Concerning the minimum value of the stolen object for the crime of theft to be punishable, the four schools hold differing opinions, based on several *ahadith*.⁵⁸¹ According to the Hanafi school, the value of the stolen object has to be at least one dinar or 10 dirhams. The Maliki school’s view is that it should have a minimum value of three dirhams, the Shafei

⁵⁷⁵ This can refer to a bad reputation, or if a person has been convicted of a crime before, or if he was convicted of lying before.

⁵⁷⁶ Al-Jaziri op cit note 190 vol 5 at 197.

⁵⁷⁷ Ibn Najm op cit note 541.

⁵⁷⁸ Al-Jaziri op cit note 190 vol 5 at 201.

⁵⁷⁹ Ibn Najm op cit note 541.

⁵⁸⁰ Jumah op cit note 223 at 138; Ibn al-Qayyim al-Jawziyyah op cit note 36 vol 2 at 61–2; Al-Jaziri op cit note 190 vol 5 at 138; Abi al-Barakat op cit note 514 at 152–6; Salih al-Fawzan *Mulachas al-Fiqh al-Islami* (2001) vol 2 at 620; Sayed Sabeq *Fiqh al-Sunnah* (1983) vol 2 at 410; Ibn Hajar al-Asqalani *Belugh al-Muram min Adelat al-Ahkam* 6 ed (2004) 389.

⁵⁸¹ One of the texts used as legal basis concerning the question of the minimum value of the stolen object is a *hadith* that quotes the Prophet Muhammad ordering a thief’s hand to be cut off for stealing an egg or a rope, while the term ‘egg’ (*baiga*), is understood as referring to an iron helmet. A rope was estimated to have cost a few dirham. *Sahih al-Bukhari* (1997) vol 8 ch 7 at 407 *hadith* 6783. Another *hadith* narrated by Aishah reports: ‘The Prophet said: “The hand of a thief should be cut off for stealing a quarter of a Dinār.”’ *Sahih al-Bukhari* (1997) vol 8 ch 7 at 411 *hadith* 6790.

school requires a quarter dinar, and also the Hanbali school requires a quarter dinar or three dirhams.⁵⁸² One dinar in the Prophet's time was 4.25 grams of gold.

Theft by embezzlement (*ichtilas*) is treated as any other kind of theft by the Hanbali school only. The Hanafi, Maliki and Shafei schools, by contrast, oppose this view due to the fact that, in the case of embezzlement, there is no locked place (*herz*) involved, and thus the definition of the *hadd* crime of theft is not fulfilled. The scholars who hold to this view suggest that embezzlement should be treated according to the punishment for *ta'zir* crimes.⁵⁸³

Concerning the punishment for theft, the four schools agree that if a thief is convicted for the first time, his or her right hand has to be cut off. This punishment is prescribed in the Qur'an in Surah 5:38-39. The four schools, furthermore, agree that if the person is convicted for the second time, his or her left foot should be cut off.⁵⁸⁴ In this instance, all four Sunni schools go beyond the qur'anic prescriptions for theft, where no mention is made of the amputation of feet.

For repeat offenders, who commit the crime of theft more than twice, the four schools disagree on the punishment. The Hanafi school rejects a further amputation, and assigns imprisonment as a punishment for third-time convicts. The Hanafi school, furthermore, requests that the thief replace the stolen object.⁵⁸⁵ Some of the Hanbali scholars agree on the rejection of any further amputation, stating that the dignity of the convict is more important than property or money.⁵⁸⁶ This position reflects the purpose of *Shariah* best, which is to reduce the burden on Muslims.⁵⁸⁷ The rest of the Hanbali scholars, as well as those of the Maliki and Shafei schools, by contrast, call for further amputations for repeat offenders.⁵⁸⁸ They hold that if the thief is convicted for the third time, his left hand shall be cut off, and if he is convicted a fourth time, his right foot shall be cut off. They assign imprisonment only if he is convicted a fifth time.⁵⁸⁹ Interestingly, even the Hanbali, Maliki and Shafei schools eventually apply the punishment of imprisonment for repeat offenders. Notably, neither the

⁵⁸² Al-Jaziri op cit note 190 vol 5 at 142.

⁵⁸³ Al-Jaziri op cit note 190 vol 5 at 163; Abdulrahman al-Najdi *Hashiat al-Raud al-Murabba ala Zad al-Musagna* (1976) vol 7 at 355; Mahmud Bin Ahmad al-Aini *Al-Benayah fi Sharh al-Hidayah* (1990) vol 6 at 374; Al-Bagdadi op cit note 536 at 1413; Al-Mazni op cit note 533 at 344.

⁵⁸⁴ Al-Jaziri op cit note 190 vol 5 at 138; Al-Hanafi op cit note 530 at 78; Al-Dumeri op cit note 517 at 932–41; Al-Nawawi op cit note 538 at 506–10.

⁵⁸⁵ Al-Jaziri op cit note 190 vol 5 at 143; Al-Berni op cit note 545.

⁵⁸⁶ Ibn Qudamah op cit note 552.

⁵⁸⁷ Abi al-Barakat op cit note 514 at 156–60.

⁵⁸⁸ Al-Jaziri op cit note 190 vol 5 at 146; Al-Nawawi op cit note 538 at 506–10.

⁵⁸⁹ Al-Jaziri op cit note 190 vol 5 at 146; Kalil Ibn Ishaq al-Maliki *Muktassar Kalil fi Fiqh al-Imam Malik* 2 ed (2004) 252; Zakariyah al-Ansari *Fateh al-Wahab Beshareh Manhaj al-Tulab* (2001) vol 2 at 159.

amputation of feet nor imprisonment is mentioned in the Qur'an — nevertheless all four schools agree on these penalties.

Whilst all four schools agree that the punishment of amputation has to be applied on any thief, no matter whether he is male or female, free or slave, Muslim or non-Muslim,⁵⁹⁰ some Shafei scholars reject the use of amputation in the case of a Muslim who steals from Jews or Christians (the 'people of the book'), due to the alleged lack of equality between them and Muslims. The scholars who hold this view suggest treating the criminal according to *qisas* provisions instead.⁵⁹¹ This discrimination against Jews and Christians by not protecting their property to the same extent as for that of Muslims violates art 17 of the UDHR that promotes equality. It also violates art 26 of the ICCPR that protects the property of all people.

As previously mentioned, all four schools agree on the principle installed by the Prophet Muhammad that states that, in case of doubt, no *hadd* punishment shall be assigned. Cases of doubt are seen, for example, in instances when the theft took place among relatives, or if a poor person steals to secure his survival. Also, in times of war the *hadd* punishment of theft cannot be enforced.⁵⁹² In the event that a thief claims ownership of the stolen object, the schools disagree as to the punishment. According to the Hanafi, Shafei and Hanbali schools, the *hadd* punishment shall not be applied in such cases, because of the aspect of doubt.⁵⁹³ The Maliki school, however, demands that the thief to be punished as any other thief, even if he claims ownership of the stolen object.⁵⁹⁴ This ruling violates the general principle of presumption of innocence.

If a thief repents, the four Sunni schools agree that he can be forgiven as long as the case has not yet reached the imam.⁵⁹⁵

According to the Qur'an (Surah 5:39), the thief is to be granted forgiveness if he repents and amends his conduct. According to the *Sunnah*, the Prophet Muhammad said that 'the one who repents from sin is as he has no sin'.⁵⁹⁶ The qur'anic requirement of amendment of the conduct on the side of the thief includes that he returns the stolen object. This is also stressed in a correct *hadith*, according to which the Prophet Muhammad said: 'The hand is responsible

⁵⁹⁰ Al-Jaziri op cit note 190 vol 5 at 138; Al-Hanafi op cit note 530 at 78; Al-Dumeri op cit note 517 at 932–41; Al-Nawawi op cit note 538 at 506–10.

⁵⁹¹ Al-Jaziri op cit note 190 vol 5 at 160; Zedan Abdulkarim *Ahkam al-Zemyeen wal Mustamanin fi Dar al-Islam* (1982) 332.

⁵⁹² Al-Jaziri op cit note 190 vol 5 at 139–140.

⁵⁹³ Ibid at 184; Al-Nawawi op cit note 538 at 506–10; Muhammad Bin Al-Hanafi op cit note 530 at 78; Al-Maqdesi Ibn Qudamah op cit note 542 at 137.

⁵⁹⁴ Al-Dumeri op cit note 517 at 932–47.

⁵⁹⁵ They justify their opinion by a hadith of Ibn Safwan Omayyah. Al-Jaziri op cit note 190 vol 5 at 184.

⁵⁹⁶ Ali Ibn al-Hasan Ibn Hibatallah Ibn Asaker *Al-Tawba* (2001) 41.

for what it has taken until it is given back.’⁵⁹⁷ The Shafei and Hanbali schools, therefore, require that the thief brings back to its owner what he has stolen. If the stolen object was damaged, they hold that it has to be fixed by the thief.⁵⁹⁸ If the thief cannot restore or recover the stolen object, both schools argue that Surah 2:280 can be interpreted as saying that he should be given enough time to do so, and that it would actually be best if the thief could be released from his obligation: ‘If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.’

This merciful attitude strongly contrasts the aforementioned harsh view of Maliki, Shafei and some Hanbali scholars.

(d) Drinking alcohol (*shurb al-khamr*)

The crime of *shurb al-khamr* is based on the qur'anic verse that declares that *al-khamr* is an abomination to Allah (Surah 5:90) since it can cause the ‘mind to be befogged.’⁵⁹⁹ It can be noted, that the definition of the crime is not fully clear, since different opinions and interpretations evolve around the meaning of *al-khamr*. In Chapter 2 it was explained that *al-khamr* refers to alcohol made out of dates or other fruits — not including grapes — but even though wine (*nabiz*) is not mentioned, the Muslim jurists used the concept of analogical deduction to declare that wine will be treated the same way as other alcoholic drinks (*al-khamr*).⁶⁰⁰ A definition of *shurb al-khamr* accepted by all four schools describes it as ‘drinking any kind of drink that can cause the person to get drunk’.⁶⁰¹ The English translations translate *al-khamr* in Surah 5:90 accordingly as intoxicant (Asad and Ali) or as strong drink (Pickthall). In their legal discussion of the crime of drinking, however, the Islamic scholars usually refer mainly to wine. This can be seen, for example, in the scholars’ discussion of the definition of alcohol where the four schools focus on the question as to at what point grape juice can be considered having transformed into wine. Since grape juice is usually fermented and transformed into alcohol after three days, the Hanbali school says that after this period it will be considered alcohol (*khamr*), and whoever drinks it will be subject to the *hadd* punishment.⁶⁰² The Hanafi,⁶⁰³ Maliki⁶⁰⁴ and Shafei⁶⁰⁵ schools say that that as long as the

⁵⁹⁷ *Sunan Abu Dawud* (2010) vol 3 at 822; *Sunan at-Tirmidhi* (1977) vol 3 at 564.

⁵⁹⁸ Abu Zayd op cit note 239 at 420.

⁵⁹⁹ Surah 4:43.

⁶⁰⁰ Al-Daqaq & Fattah op cit note 41 at 35–6.

⁶⁰¹ Jumah op cit note 223 at 137; Al-Fawzan op cit note 580.

⁶⁰² Al-Jaziri op cit note 190 vol 5 at 25; Al-Fawzan op cit note 580 at 540.

⁶⁰³ Ahmad Ibn Idris al-Qarafi *Al-Zakerah* (1994) vol 12 at 200.

⁶⁰⁴ Al-Dumeri op cit note 517 at 946–9.

grape juice has not yet fermented and does not yet have fermentation foam, it cannot be considered *khamr* and who drinks it will not be considered having committed the crime of drinking. The focus on wine is reflected also in the English translation of Surah 2:219, where Ali translates the term *al-khamr* as wine. Limiting the discussion to the definition of wine, though, is not logical since it ignores consumption of strong liquors.

As punishment for the crime of drinking, the Maliki, Hanafi and Hanbali schools assign beating with 80 lashes⁶⁰⁶ the Shafei school assigns 40 lashes.⁶⁰⁷ Both views, though, contradict the Qur'an, where no punishment is mentioned.

According to the Maliki,⁶⁰⁸ Shafei⁶⁰⁹ and Hanbali⁶¹⁰ schools, the criminal offence of drinking is fulfilled when a person drinks a kind of alcohol that can lead to drunkenness, independently of whether he or she has actually got drunk.⁶¹¹ The Hanafi school, by contrast, says that a person can be punished only if he/she actually got drunk. Drinking a glass of wine by itself cannot lead to punishment.⁶¹²

Concerning the evidence for a suspect to be convicted, the Maliki,⁶¹³ Shafei⁶¹⁴ and Hanbali⁶¹⁵ schools say that even if a person does not smell of alcohol he or she can be convicted by witnesses alone.⁶¹⁶ The Hanafi school's view is that the smell of alcohol on a person is insufficient evidence for a conviction, for both a witness and the smell of alcohol are required to convict a person of the crime of drinking.⁶¹⁷

In the event of a person not smelling of alcohol but nevertheless confessing to having imbibed alcohol, the Maliki, Shafei and Hanbali schools declare that, due to such confession, he/she will be convicted and subjected to the punishment.⁶¹⁸ The Hanafi school, by contrast, says that a confession alone without the smell cannot be considered sufficient evidence to lead to a conviction.⁶¹⁹

⁶⁰⁵ Al-Nawawi op cit note 538 at 513–14.

⁶⁰⁶ Abdulah Bin Ahmad al-Nassafi *Kenz al-Daqaq* (2011) 355; Al-Dumeri op cit note 517 at 946–9.

Al-Qarafi op cit note 603.

⁶⁰⁷ Al-Jaziri op cit note 190 vol 5 at 13–14.

⁶⁰⁸ Al-Maliki op cit note 589 at 255.

⁶⁰⁹ Al-Hin & Al-Bugha & Al-Shurbagy op cit note 520 at vol 8 at 71.

⁶¹⁰ Al-Merdawi op cit note 520 at 1745.

⁶¹¹ Al-Jaziri op cit note 190 vol 5 at 19.

⁶¹² Al-Hanafi op cit note 530 at 70.

⁶¹³ Al-Maliki op cit note 589 at 255.

⁶¹⁴ Al-Hin & Al-Bugha & Al-Shurbagy op cit note 520 at vol 8 at 71.

⁶¹⁵ Al-Merdawi op cit note 520 at 1745.

⁶¹⁶ Al-Jaziri op cit note 190 vol 5 at 29.

⁶¹⁷ Al-Qarafi op cit note 603.

⁶¹⁸ Muhammad Bin Ibrahim al-Twagri *Muktassar al-Fiqh al-Islami* 11 ed (2010) 958, 984.

⁶¹⁹ Al-Jaziri op cit note 190 vol 5 at 30.

The four schools also disagree as to the method of punishment. The Shafei school's view is that the convict should be beaten with branches of a palm tree or shoes or a piece of cloth or robe or with the hand,⁶²⁰ while the Hanafi and Maliki schools believe that a whip can also be used.⁶²¹ Some scholars of the Hanbali school, though, permit the use of a whip only if the convict is rebellious and vicious.⁶²²

In summary, it can be noted that concerning the *hadd* of drinking alcohol, there is great disagreement between the four schools and even the definitions of the crime are very unclear. It is clear, though, that the assignment of a punishment for drinking contradicts the Qur'an.

(e) Highway robbery (*qata al-tariq*)

The definition of *qata al-tariq* (highway robbery) that all four Sunni schools of jurisprudence agree on is 'carrying a weapon and frightening the pedestrians or travellers on a public road (*tariq*)'. The Hanafi school holds the opinion that the criminal offence of *qata al-tariq* is fulfilled only if committed outside a city.⁶²³ According to the Shafei,⁶²⁴ Maliki⁶²⁵ and Hanbali⁶²⁶ schools, it does not make a difference as to whether the highway robbery is committed inside or outside the city — either way, the crime will be treated as a *hadd crime* and the offender shall be punished according to the prescriptions of Surah 5:33, ie with punishments ranging from execution, or crucifixion, to the amputation of hands and feet from opposite sides, to exile from the land.⁶²⁷

The Hanafi, Shafei and Hanbali schools agree as to the following punishments for highway robbers:⁶²⁸ If an offender or group of offenders rob a victim and steal at least 10 dirham, the offender(s) shall be punished for the crime of robbery by having both hands and feet cut off from opposite side.⁶²⁹ If a victim is killed without money being taken, the perpetrator(s) shall be punished for the killing by having his/their head cut off.⁶³⁰ If the offender(s) kill a victim and take his money, the imam has the choice of the following options, namely either to cross amputate his hands and feet and to crucify him, or to crucify

⁶²⁰ Abu Zayd op cit note 239 at 249.

⁶²¹ Al-Twagri op cit note 618.

⁶²² Al-Jaziri op cit note 190 vol 5 at 17–18.

⁶²³ Ibid at 362.

⁶²⁴ Al-Nawawi op cit note 538 at 511–12.

⁶²⁵ Al-Basri op cit note 532 at 232–3.

⁶²⁶ Muhammad Bin Saleh al-Uthaimeen *Muzakerat al-Fiqh* (2002) vol 4 at 32.

⁶²⁷ Al-Jaziri op cit note 190 vol 5 at 360; Al-Mazni op cit note 533 at 346; Abi al-Barakat op cit note 514 at 160–2; Al-Twagri op cit note 618 at 975.

⁶²⁸ Ibid; Al-Hanafi op cit note 530 at 85; Al-Ansari op cit note 589 at 163.

⁶²⁹ Al-Jaziri op cit note 190 vol 5 at 360.

⁶³⁰ Ibid.

him or behead him with a sword.⁶³¹ If the offender(s) go out with the intention and means to commit the crime of highway robbery, but are arrested before having robbed or killed anyone, he/they shall be imprisoned until he/they repent(s).⁶³² This kind of punishment is understood as an application of ‘being exiled from the land’, mentioned in Surah 5:33.⁶³³

The Maliki school holds that if the robber killed a person he should not be cut or be ‘exiled from the earth’ (ie be put in prison), but be killed and/or be crucified.⁶³⁴ If the offender did not kill anyone, the imam has four different options of punishment, namely to crucify and kill him, to kill him by the sword, to cross amputate or to imprison him. If the offender is a woman, the Maliki school holds that she shall be killed or cross amputated but she should not be crucified, nor be exiled or imprisoned.

If a woman or an immature young man joined a group of highway robbers and agreed to kill and to take money from the victim, the Shafei,⁶³⁵ Maliki⁶³⁶ and Hanbali⁶³⁷ schools say that they cannot be spared from the punishment and they have to be killed. The Hanafi school, by contrast, argues that the woman should not be killed, but she should be cross amputated instead. For an immature young man there shall be no punishment whatsoever.⁶³⁸

If the victim who was killed by highway robbers is not considered to be equal to the offender, ie if the victim is a non-Muslim or a child, the Maliki⁶³⁹ and Shafei⁶⁴⁰ schools hold that the offender has to be killed whether there is equality or not. The Hanafi⁶⁴¹ and Hanbali⁶⁴² schools, by contrast, say that due to lack of equality the offender should not be killed, but should pay blood money to the relatives of the victim. This is a violation of the principle of equality. A child actually deserves even more protection, and the punishment should be more severe, not less.

If the offender repents before being caught, there is an option of repentance.⁶⁴³ The Maliki⁶⁴⁴ and Shafei⁶⁴⁵ schools say that repentance can be accepted, if there is clear evidence

⁶³¹ Ibid.

⁶³² Al-Twagri op cit note 618 at 975; Al-Hanafi op cit note 530 at 85; Al-Ansari op cit note 589 at 163.

⁶³³ Al-Jaziri op cit note 190 vol 5 at 360.

⁶³⁴ Al-Basri op cit note 532 at 232–3.

⁶³⁵ Al-Nawawi op cit note 538 at 511–12.

⁶³⁶ Al-Basri op cit note 532 at 232–3.

⁶³⁷ Al-Uthaimeen op cit note 626.

⁶³⁸ Al-Jaziri op cit note 190 vol 5 at 364.

⁶³⁹ Al-Basri op cit note 532 at 232–3.

⁶⁴⁰ Al-Nawawi op cit note 538 at 511–12.

⁶⁴¹ Al-Hanafi op cit note 530 at 85.

⁶⁴² Al-Uthaimeen op cit note 626.

⁶⁴³ Al-Jaziri op cit note 190 vol 5 at 360; Al-Mazni op cit note 533 at 346; Abi al-Barakat op cit note 514 at 160–2; Al-Twagri op cit note 618 at 975.

⁶⁴⁴ Al-Basri op cit note 532 at 232–3.

of a real change in behaviour. The Hanafi and Hanbali schools do not require such evidence of real change for the repentance to be accepted.⁶⁴⁶ This is surprising, especially since highway robbery is quite a serious crime and considered to be against public interests and the rights of Allah.

(f) Fighting against Allah and His Messenger (*haraba*)

As previously pointed out, the definition and prescriptions of the crime of *haraba* as developed by Islamic jurisprudence cannot be clearly distinguished from the afore-discussed crime of highway robbery, since it actually includes the crime known as highway robbery. The four schools agree on the definition of *haraba*, as waging war against Allah or His Messenger by saying or deed, and spreading corruption on earth, including highway robbery.⁶⁴⁷

Interestingly, though, only the Maliki school and some Hanbali scholars list *haraba* as a *hadd* crime; the others treat it as *ta'zir* crime.⁶⁴⁸

As previously mentioned, the addition to 'waging war', namely 'by saying or deed', gives a completely new meaning and dimension to the crime. The four Muslim Sunni schools agree that anyone who insults the Prophet has to be killed.⁶⁴⁹ Imam Ahmad said: 'Anyone, [whether] Muslim or infidel, who curses the Prophet or belittles him, has to be killed and has no option of repentance.'⁶⁵⁰ This very wide definition of the crime of *haraba* violates the freedom of opinion and freedom of expression.

All four schools agree, further, that for the criminal offence of *haraba* to be fulfilled, the offender has to be male, mature, and he must have used force. Furthermore, the crime must have been committed in public.⁶⁵¹ Despite, and in contradiction to, this commonly shared definition, the Maliki, Shafei and Hanbali schools believe that if an immature young man or an insane person joins a group of men in committing the crime of *haraba*, he cannot be spared from the punishment, and has to be punished just as anyone else.⁶⁵² Only the Hanafi school refuses to punish an immature or insane offender due to the above-mentioned definition.

⁶⁴⁵ Al-Nawawi op cit note 538 at 511–12.

⁶⁴⁶ Al-Jaziri op cit note 190 vol 5 at 366.

⁶⁴⁷ Jumah op cit note 223 at 139; Al-Dumeri op cit note 517 at 942-5.

⁶⁴⁸ Abi al-Barakat op cit note 514 at vol 2 at 161; Ahmad Bin Muhammad Ibn Qudamah *Al-Muqna fi Fiqh al-Imam Ahmad Ibn Hanbal* (2000) 445.

⁶⁴⁹ Ibn Taymiyyah *Al-Sarim al-Maslul ala Shatim al-Rasul* (2001) 32.

⁶⁵⁰ Ibn Taymiyyah op cit note 381 at 421.

⁶⁵¹ Ibn Abidin op cit note 519, vol 3 at 232.

⁶⁵² Muhammad Arafa al-Disuqi *Hashiat al-Disuqi ala al-Sharh al-Kabir* (1881) vol 4 at 348.

Another contradiction to the aforementioned commonly shared definition concerns female offenders. If a woman is convicted of having taken part in committing the crime of *haraba*, the majority of the scholars of the four schools believe she should be punished in the same way as a man.⁶⁵³ The Maliki school believes as well that she should be punished, just not be crucified.⁶⁵⁴ Again, it is only the Hanafi school that holds that women should be spared from any punishment, if they have committed the crime of *haraba* together with a man.⁶⁵⁵ This opinion is based on the view that women have a softer nature than men and less criminal energy. Consequently, they are presumed not to be the main offenders.⁶⁵⁶ It can be presumed, also, that if a woman is convicted of having committed the crime of *haraba* by herself, she will be punished in the same way as a man.

As previously mentioned, the second part of the definition, namely, ‘striving for mischief’, or ‘spreading corruption on earth’ is interpreted in different ways. The Maliki school describes it as the rebellion of armed groups or individuals against the Muslim society by causing chaos and bloodshed of innocents, including robbery, and rape which is considered attacking the honour of a woman and her family⁶⁵⁷ or as ‘any assault against people’s honor by use of force for the purpose of stealing in a neighbourhood or attacking men’s wives within their own territory [or residence]’.⁶⁵⁸ This definition describes the crime of highway robbery. This shows the confusing use of the terms *haraba*, *qata a-tariq* and *al-baghi*.

What increases the confusion even more is the fact that the Hanafi school conflates its understanding of *haraba* with the crime of theft. The Hanafi school describes the crime of *harba* as referring to highway robbery and calls it ‘the major theft’ (*al-sariqa al-kubra*), in contrast to the normal crime of theft (*hadd al-sariqa*), which usually happens secretly, whilst one of the main characteristics of the crime of *haraba* is that it is committed publicly and by means of force.⁶⁵⁹

(g) Rebellion (*al-baghi*)

The crime of rebellion (*al-baghi*) is listed as a *hadd* crime by the Shafei and Maliki schools and by some of the Hanbali scholars.

⁶⁵³ Masaud Bin Ahmad al-Kasani *Badae’ al-Sanae’ fi Tertib al-Sharae* 2ed (1986) vol 7 at 95.

⁶⁵⁴ Ibn Abidin op cit note 519, vol 3 at 232.

⁶⁵⁵ Al-Kasani op cit note 653 at 91.

⁶⁵⁶ Ibid.

⁶⁵⁷ Al-Hin & Al-Bugha & Al-Shurbagy op cit note 520 at vol 8 at 82; Al-Merdawi op cit note 520 at 1764.

⁶⁵⁸ Wazarat al-Aukaf wal Shu’un al-Islamiyah *Al-Mausua al-Fiqhiyah al-Kuweitiyah* (1983) vol 2 at 153.

⁶⁵⁹ Muhammad Bin Ali Bin Muhammad al-Shawkani *Fath al-Qadir al-Jamea beina Fan al-Riwaya wa al-Dirayah min Aelm al-Tafsir* (2010) vol 4 at 46.

All four Sunni schools agree that the crime of rebellion refers to rebellion against an imam.⁶⁶⁰ They also agree that all the commands of an imam should be obeyed and that all the provisions made by an imam or his assistants or his governors have to be followed. The only exception allowed is if his order is considered to be a sin against Allah.⁶⁶¹ Disobedience or refusal to submit is, consequently, understood as rebellion against an imam and thus against Allah.⁶⁶² Some scholars describe rebellion as referring to opposition to the ‘constituted authority’, which can also be a political leader or the economic order.⁶⁶³

The four schools agree that the crime of rebellion is punishable by death,⁶⁶⁴ and that the prescriptions of Surah 5:33 apply.⁶⁶⁵

If Muslims rebel against an imam or a political leader for hermeneutic reasons (*ta'wil*), the four schools agree that the imam should do his best to peacefully convince the rebels and to prove their point to be wrong. The imam is required to do whatever he can to find a way that can lead to peace and reconciliation. Surah 49:9 says that if two parties of believers have a conflict, they should make peace. Only if the rebellious group refuses to obey the leader and refuses reconciliation and if it starts fighting with arms against the leader, Surah 49:9 says: If they ‘transgress beyond bounds’ an imam has the right to fight them back until they surrender to the will of Allah.⁶⁶⁶

This call to ‘fight for the hermeneutics of the Qur'an’ is mentioned in a correct *hadith* narrated by Abi Saïd al-Khidri that quotes the Prophet Muhammad, saying: ‘Amongst you who will fight for the hermeneutics of the Qur'an as I fought for its revelations.’⁶⁶⁷ Imam Shafei explained that the highest level of rebellion took place during the time of Ali Ibn Abi Talib, who responded to the many rebellions during his time by either signing peace agreements or by fighting.⁶⁶⁸

Interestingly, the Hanfi school shares the aforementioned understanding, but additionally holds the view that *qata'a al-tariq* (highway robbery) can be considered as a form of rebellion. It argues that people who spread corruption (*yufsidun*) can be considered rebellious,

⁶⁶⁰ Ibn Najm op cit note 541 at 264–9; Kalil Ibn Ishaq al-Maliki *Muktassar Kalil fi Fiqh al-Imam Malik* 2 ed (2004) 247; Al-Nawawi op cit note 538 at 1715; Abi al-Barakat op cit note 514 at vol 2 at 163–4.

⁶⁶¹ Ibid.

⁶⁶² Al-Jaziri op cit note 190 vol 5 at 368.

⁶⁶³ Okon op cit note 67 at 229.

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid.

⁶⁶⁶ Al-Jaziri op cit note 190 vol 5 at 367; Al-Merdawi op cit note 520 at 1769; Ibn Qudamah op cit note 552 at 308.

⁶⁶⁷ Ali Ibn Abi Bakr al-Haithami *Magma al-Zawaed wa Man ba al-Fawaed* (1994) vol 6 at 244 and vol 9 at 133.

⁶⁶⁸ Al-Jaziri op cit note 190 vol 5 at 368; Al-Ansari op cit note 589 at 154.

whether or not they use arms: ‘People who rob the money of people and kill them and spread fear — these people are considered to be rebellious.’⁶⁶⁹

(h) Apostasy (*al-riddah*)

All four Sunni schools agree on the definition of apostasy (*al-riddah*) as ‘leaving Islam willingly by saying or doubt or deed’,⁶⁷⁰ as described in Chapter 2.⁶⁷¹ While the Maliki and Shafei schools and some of the Hanbali scholars list it as a *hadd* crime, the Hanafi school and the majority of the Hanbali scholars treat apostasy as only a *ta’zir* crime. Nevertheless, they all agree that anyone who is convicted of committing the crime of apostasy must be killed,⁶⁷² and that the apostate is given only three days to repent and to return to Islam. If the apostate does not repent within these three days, he or she will be sentenced to death by beheading before the sunset of the third day.⁶⁷³ If the apostate returns to Islam and declares the confession of faith (*shahada*), all four schools⁶⁷⁴ accept such repentance and the person will be free.

For the crime of apostasy to be proven and the suspect to be convicted, the four schools require the testimony of two just men. According to the Hanafi school, the judge should furthermore request evidence from the two witnesses to support the two just men’s accusation.

According to the Maliki school, the apostate is to be given food and drink during his three-day imprisonment, and he should not be beaten or mistreated. An imam or judge shall exhort the apostate several times per day to return to Islam. If the apostate repents, his or her repentance will be accepted; otherwise he/she has to be killed before the sunset of the third day. For the purpose of deterrence his or her dead body shall be thrown into the desert or wilderness.⁶⁷⁵

The call to repent (*istitaba*) is also practiced by the Hanbali school,⁶⁷⁶ and the Hanafi school views it as recommended, though not as obligatory.⁶⁷⁷

⁶⁶⁹ Al-Bukari op cit note 553 at 128.

⁶⁷⁰ Jumah op cit note 221 at 140. A person can be convicted of having committed the crime of apostasy either by saying, for example by insulting Allah or His Messenger or his angels or by demonstrating disbelief, for example by denying any of the basic teachings of Islam, or by deeds, for example by bowing down to an idol or by putting the Qur’an on the floor or in a dirty place.

⁶⁷¹ Al-Samara’i op cit note 416 at 103–13.

⁶⁷² Al-Jaziri op cit note 190 vol 5 at 373.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid at 384.

⁶⁷⁵ Ibid at 374.

⁶⁷⁶ Ibid 374 & 384

If a woman commits the crime of apostasy, the Shafei, Maliki and Hanbali schools agree that an imam shall exhort her to repent and if she refuses, her sentence shall be the same as that of a man.⁶⁷⁸ If the female apostate is a nursing mother, the Maliki school says that the sentence of death should be delayed until she has finished nursing her child, if there is no other mother who can nurse the baby.⁶⁷⁹

According to the Hanafi school, a female apostate should be imprisoned until she returns to Islam or dies. During her imprisonment she will be beaten every day with 39 lashes. If she repents, she will be free, but if she refuses to repent, the beating will eventually lead to her death. If it is a man who has killed this woman, he will be free and should not have to pay blood money.⁶⁸⁰

In the case of a minor turning away from Islam, the Shafei school holds he cannot be considered apostate. The Hanafi school, by contrast, believes that even a minor can be considered apostate. His punishment, though, should not be the death sentence, but imprisonment. According to the Maliki and Hanbali schools, it is not the age, but puberty, that will be the deciding factor, for if the minor has reached puberty he will be treated as an adult apostate.⁶⁸¹

Insulting the Prophet is viewed as falling under the crime of apostasy and whoever insults the Prophet has to be killed in accordance with the punishment for apostasy, and repentance cannot be accepted.⁶⁸²

III The practical application of *hudud* ordinances in the Islamic world

While most Muslim countries do not practice *hudud* ordinances at all, others, like Saudi Arabia and Pakistan, have been practicing them for decades. In Saudi Arabia *hudud* ordinances have been practiced since the Saudi royal family began its reign in 1932.⁶⁸³ Pakistan implemented *hudud* ordinances in 1979 and Sudan did so in 1991. Brunei Darussalam, by contrast, started to implement them as recently as 2014.

⁶⁷⁷ Ibid at 373.

⁶⁷⁸ Ibid at 374.

⁶⁷⁹ Ibid.

⁶⁸⁰ Ibid.

⁶⁸¹ Ibid at 383.

⁶⁸² Ibid at 378.

⁶⁸³ Aziff Azuddin '10 things to know about hudud' 19 March 2015, available at <http://poskod.my/cheat-sheets/10-things-know-hudud/>, accessed on 5 July 2015.

In some Muslim countries *hudud* ordinances are practiced only in some of their provinces. In Nigeria, for example, they are enforced in twelve of its 36 provinces and in Indonesia they are practiced in the province of Aceh only. Saudi Arabia, Pakistan, Sudan and Brunei Darussalam, on the contrary, apply *hudud* ordinances in the entire country. This is why these four countries are of particular interest for the purpose of this research. This is the more so, since they are representative countries for the four Sunni schools of thought.

In terms of the geographical distribution of the four main Sunni schools of jurisprudence,⁶⁸⁴ the Hanafi school is by far the largest. It was first established in Iraq and spread from there into Persia (now Iran), Egypt, Syria, Lebanon and North Africa. One of the key figures who helped to spread it through his writings was Imam Abi Yusif, who was the chief judge of the Abassi Islamic caliphate. Later the Hanafi school became the official school of thought (*mazhab*) of the Ottoman caliphate. Today, the Hanafi school is the predominant school of Muslims in Turkey, Iraq, India, Afghanistan, Bangladesh, Burma (now Myanmar), the Maldives, East Asia, Russia and Eastern Europe generally and Pakistan.

Pakistan applies *hudud* ordinances according to the Hanafi school. It has one of the biggest Muslim populations in the world and it plays a key role in international relations between the Islamic world and the west. This is especially due to its relationship with Afghanistan, which for years has been considered the centre of radical Islam, having provided a safe haven for al-Qaeda. It was for that reason that the United States of America invaded Afghanistan and started a war that lasted for years, thereby dominating and fuelling the conflict between the Islamic world and the west. For years Pakistan has been in a very difficult position, since on the one hand it seeks to maintain good relations with the west and therefore tries to accommodate a more modern form of Islam,⁶⁸⁵ whilst on the other, it has to deal with the strong radical Islamic influence that arises both from within it — from radical Islamic groups and Islamic universities and schools (*madrasas*), and from outside from its neighbours.

The Maliki school, was founded by Imam Malik, who spent his entire life in Medina. It was first taught and practiced in different places on the Arabian Peninsula. From there it was spread to Egypt, Sudan, and other African countries, including Nigeria, but also to some places on the Arabian Gulf, such as Kuwait and the United Arab Emirates, where the Maliki

⁶⁸⁴ There are other Sunni jurisprudential schools, including the school of Awzaa'I, the school of Layth Ibn Saad and the school of Zahereyah, but they are not very widely spread.

⁶⁸⁵ Cameron MacKenzie 'Building democracy in Pakistan' 108, available at <https://www.princeton.edu/jpia/past-issues-1/2002/6.pdf>, accessed on 22 December 2015.

school became the official school of the state.⁶⁸⁶ Today the Maliki school's influence is found in almost the whole of Africa except for the north-east.

Sudan, which fully applies *hudud* ordinances according to the Maliki school, is one of the largest and the most troubled countries in Africa. For decades the country was in the grip of civil war, until 2011, when a new state, South Sudan, came into existence. Sudan is known for its human rights violations and the Sudanese president is even wanted by the International Criminal Court for acts of genocide and crimes against humanity. Sudan is populated by both Arab-speaking and non-Arab-speaking people, and a number of different ethnic groups, most of which have been Arabised. It is also acknowledged that a great number of human rights abuses take place in Sudan.

The Shafei school spread in the Muslim world thanks to the journeys made by Imam Shafei, its founder who travelled especially between Iraq, the Arabian Peninsula and Egypt. After his death his students continued to spread his teaching. Today the Shafei school is the most popular school in Egypt and Southeast Asia, namely Malaysia, Indonesia and Brunei Darussalam,⁶⁸⁷ and in southern Syria, Yemen, Somalia, the Kurdish areas of Iraq and Turkey and. In most of these countries, however, *hudud* ordinances are either not implemented at all — as is the case in Egypt — or are practised in only some provinces, as in Indonesia.

Brunei Darussalam, one of the richest countries in Asia, is the only Shafei Muslim country that implements *hudud* ordinances nationwide. It started implementing the *hudud* ordinances only recently.

The Hanbali school of jurisprudence has the smallest number of followers, who are concentrated in the Arabian Peninsula. Saudi Arabia is the only major country that follows the tenets of the Hanbali school of jurisprudence. There are a number of reasons why the Hanbali school did not spread to other Muslim countries as did the other three schools; one being that the Hanbali school lacks the element of *ijtihad* (independent reasoning). Since the Hanbali school focuses mainly on the text, without using personal opinion (*al-raa'y*), no flexibility is allowed to take into consideration the reality of people's lives and contemporary challenges.⁶⁸⁸ In addition, the Hanbali school did not spread further because when it was established in the third and fourth centuries AH the other three main Sunni schools were already in existence and had been adopted by different Muslim countries. Thus, there was no country or political leader able to promote the Hanbali school's jurisprudential principles.

⁶⁸⁶ Al-Jazirah 'Al-Shariah fi al-Sudan: Al-tadbiq wal nataeg' *Al-Jazirah Newspaper* 10 May 2014 iss 437, available at <http://www.al-jazirah.com/culture/2014/10052014/tar4.htm>, accessed on 1 July 2015.

⁶⁸⁷ Mohammed Bin Abdullah Bin Mohammed Bin Ibrahim Ibn Battuta *Rihlat Ibn Battuta* (1987) 630.

⁶⁸⁸ Abu Zayd Abd al-Rahman Ibn Muhammad Ibn Khaldun *Muqaddimah Ibn Khaldun* (1984) 448.

This was especially so since its scholars refused to participate in politics.⁶⁸⁹ In the eighteenth century, a Hanbali scholar cooperated with a politician for the first time. This was when Muhammad Bin Abdul Wahab worked together with the Saudi politician Muhammad Bin Saud, to establish the religio-political movement that became known as the Wahabi movement. The existence of extremely radical Wahabism eventually resulted in the establishment of the political state of Saudi Arabia with its judicial system based on the Hanbali school of jurisprudence.⁶⁹⁰ Today, the Kingdom of Saudi Arabia fully applies these teachings as the legal basis for its judicial system and *hudud* ordinances are incorporated in Saudi criminal law and practiced on regular basis.

Saudi Arabia is one of the most influential Muslim countries in the world, and it is considered to be the spiritual centre of Islam worldwide for being its birthplace and the location of Islam's most holy sites, including Mecca and Medina. More than two million people travel to Saudi Arabia every year for the *hajj*. Saudi Arabia supports all kinds of radical Islamic groups, such as the Salafi movement and terrorist groups, including al-Qaeda, whose founder Osama bin Laden was a Saudi, as were most of the 9/11 hijackers. Saudi Arabia also plays a leading role in spreading Islam in the west by supporting Islamic organisations and societies and by funding the construction of Islamic centres and schools.

Saudi Arabia, Pakistan, Sudan, and Brunei Darussalam are all members of the United Nations and are among the signatories of some of the most important international human rights documents. These include the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT),⁶⁹¹ the International Covenant on Civil and Political Rights (ICCPR),⁶⁹² the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶⁹³ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁶⁹⁴

Besides, all four countries are state parties of the Cairo Declaration of Human Rights in Islam (CDHRI).⁶⁹⁵ Saudi-Arabia and Sudan are, further, committed to the Arab Charter of

⁶⁸⁹ Khalid al-Allal 'Al-Hanabelah fi muqademat Ibn Khaldon' *Saa'id al-Fawaed* website available at <http://www.saa'id.net/bahoth/82.htm>, accessed on 1 December 2015.

⁶⁹⁰ Mohammed Ismail al-Muqadem *Khwater Hawla al-Wahabyah* (2008) 35.

⁶⁹¹ CAT adopted by the UN General Assembly on 10 December 1984 and entered into force on 26 June 1987.

⁶⁹² International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976.

⁶⁹³ ICESCR art 27 adopted 16 December 1966 by the UN General Assembly and entered into force 3 January 1976.

⁶⁹⁴ CEDAW adopted by the UN General Assembly on 18 December 1979 and entered into force 3 September 1981.

⁶⁹⁵ Cairo Declaration on Human Rights in Islam, 5 Aug 1990, U.N. GAOR, World Conf. on Hum.Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], available at <https://www1.umn.edu/humanrts/instree/cairodeclaration.html>, accessed on 16 April 2016.

Human Rights (ACHR).⁶⁹⁶ Sudan is also state party of the ‘African (Banjul) Charter on Human and Peoples’ Rights’ (ACHPR),⁶⁹⁷ and Brunei is member of the ‘Association of Southeast Asian Nations’ (ASEAN) and signed the ASEAN Human Rights Declaration (AHRD),⁶⁹⁸ which is explicitly committed to the Universal Declaration of Human Rights and the UN Charter.

Despite their official commitment to several human rights documents, Pakistan, Sudan, Brunei Darussalam, and Saudi Arabia are all known for violating international human rights laws in several ways.

The practice of the harsh and cruel *hudud* punishments, for example, violates the ban on torture or cruel, inhuman or degrading treatment or punishment, articulated in the UDHR (art 5), the CAT (art 2 para 1), the ICCPR (art 7), and the ACHPR (art 5). Criminalising apostasy by meting out the death penalty for it by beheading, violates the right to freedom of thought, conscience and religion guaranteed in the UDHR (art 18), and the ICCPR (art 18). The freedom of thought, opinion and expression guaranteed in the ICCPR art 19 is, further, violated by treating insults against the Prophet or Islam as a crime (namely as ‘spreading corruption’). The practice of the *hudud* punishments, also leads to violations of several other rights, including the right to life, liberty, and security of person (ICCPR art 6 para 1, UDHR art 3, and ACHR art 5 para 1), the right to justice (CDHRI art 19 b), the right to a fair trial (UDHR art 10, and CDHRI art 19 e), the right to equality before the law (ACHPR art 3.1), basic human rights for women, guaranteed in CEDAW (art 3), the prohibition of discrimination on the basis of religion (UDHR art 2 and 7, ICCPR art 2, ACHPR art 2, and CDHRI art 2), the right not to be subjected to arbitrary arrest, detention, or exile (UDHR art 9), and the right to be treated as equal before the law and entitlement without any discrimination to equal protection of the law (UDHR art 7, CEDAW art 15 para 1, ICCPR art 14 para 1, and ACHPR art 3).

In the following section, the cases of Saudi Arabia, Pakistan, Sudan and Brunei Darussalam will be discussed individually.

⁶⁹⁶ Saudi-Arabia and Sudan signed the Arab Charter on Human Rights on 22 May 2004. It entered into force on 15 March 2008, University of Minnesota Human Rights Library, League of Arab States. Arab Charter on Human Rights, 22 May 22 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force 15 March 2008, available at <https://www1.umn.edu/humanrts/instree/loas2005.html>, accessed on May 30, 2016.

⁶⁹⁷ Sudan signed the African Charter on Human and Peoples Rights on 27 June 1981 in the city of Nairobi. African Charter on Human and Peoples Rights (ACHR), entered into force on 21 October 1986. <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>, accessed on 30 May 2016.

⁶⁹⁸ ASEAN Human Rights Declaration (AHRD) adopted by the Heads of State/Government of ASEAN Member States at Phnom Penh, Cambodia, 18 November 2012, available at <http://www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf>, accessed on 30 May 2016.

(a) The case of the Hanafi school in Pakistan

In Pakistan, *hudud* ordinances were gradually implemented in the late 1970s. In 1977 the Pakistani government announced the official implementation of *Shariah* as the law in the country, in 1978 the Council of Islamic Ideology drafted the *hudud* law and in 1979 the Pakistani government enforced it. This *hudud* law defines *hudud* ordinances as crimes against Allah, society and the state.⁶⁹⁹

Pakistan holds to six crimes, namely *zina* (adultery), *qazf* (defamation), *sariqa* (theft), *haraba* (robbery), *baghi* (rebellion) and *shurb al-khamr* (drinking intoxicants). In contrast to the official teaching of the Hanafi school that holds only to five *hudud* crimes, Pakistan has added the crime of *baghi* (rebellion). The crime of (highway) robbery is listed under the term *haraba*.⁷⁰⁰

The different punishments for *hudud* crimes prescribed by Pakistani law are stoning to death, amputation of hands, exile, flogging and crucifixion.⁷⁰¹ In practicing these harsh and cruel punishments, Pakistan violates the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, articulated in the aforelisted articles of the CAT and the ICCPR, to both of which Pakistan has bound itself to with certain reservations.⁷⁰² Pakistan became a signatory to the CEDAW (by accession on 12 March 1996), to the ICESCR (signed on 3 November 2004 and ratified on 17 April 2008), and to the CAT and the ICCPR (signed on 17 April 2008, ratified 23 June 2010).

Despite its commitment to all these human rights documents, Pakistan is known for its human rights violations that are to a big part a result of the practice of *hudud* ordinances. Human rights activists usually criticise the Pakistani penal code for the harsh punishment of stoning to death for adultery and rape⁷⁰³ and the humiliating punishment of flogging for fornication, drinking and *qazf* (false accusations).⁷⁰⁴ The Pakistani judicial system has also

⁶⁹⁹ Council of Islamic Ideology, 'Hudud Ordinance 1979', 15, available at <http://cii.gov.pk/publications/h.report.pdf>, accessed on 1 July 2015.

⁷⁰⁰ Ibid at 151.

⁷⁰¹ Ibid at 152.

⁷⁰² Pakistan ratified the ICCPR and the CAT in June 2010, with nine reservations in ICCPR and ten reservations in CAT. In June 2011, however, most of these reservations were withdrawn, including the reservations on Articles 6, 7, 12, 13, 18, 19 and 40 of ICCPR and arts 3, 4, 6, 12, 13 and 16 on the CAT. The remaining reservations include the one on art 8 CAT and the declarations on art 20 as provided in art 28 (1) and art 30 (1) CAT. See 'Pakistan decides to withdraw most of reservations on ICCPR, UNCAT' *The Nation* 23 June 2011, available at <http://nation.com.pk/national/23-Jun-2011/Pakistan-decides-to-withdraw-most-of-reservations-on-ICCPR-UNCAT>, accessed on 12 August 2016.

⁷⁰³ Muhammad Taqi Usmani 'The Islamization of laws in Pakistan: The case of Hudud Ordinances' (2006) 96 (2) *The Muslim World* 287–304, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1478-1913.2006.00129.x/pdf>, accessed on 6 December 2015.

⁷⁰⁴ Ibid.

often been criticised for its violations of the right to a fair trial, including convictions based on statements extracted under torture or other ill-treatment.⁷⁰⁵ In doing so, Pakistan violates the right to fair trial protected in the UDHR (art 10) and the CDHRI (art 19 e). The use of torture or other ill-treatment to extract convictions, further, violates the aforementioned ban on torture.

One of the main areas of criticism concerns the discrimination of women.⁷⁰⁶ This is partly due to clause 8(b) of the *zina* ordinance that stipulates that women are not accepted as witnesses in *hadd* cases.⁷⁰⁷ Far more critical, however, is the requirement for women who were victims of rape to present four witnesses against the accused. If a woman fails to do this, she will be sentenced for the crime of *qazf*.⁷⁰⁸ Pakistan, therefore, is often criticised for wrongly punishing women for crimes they have not committed.⁷⁰⁹ As a result, victims of rape often do not dare to report their cases out of fear of themselves being accused of *qazf* or adultery. Many women who have reported their rapes⁷¹⁰ are in prison while the men who violated them are free.⁷¹¹ Another objection raised against the *zina* ordinance is that it does not distinguish between rape (*zina bil-jabr*) and adultery and fornication (*zina bil-raza*), although the former results in harsher punishments than the latter.⁷¹²

This treatment of women violates the prohibition of discrimination of women articulated in the ICCPR (art 2), and the CEDAW (art 2), as well as the equal rights for women before the law protected in the CEDAW (art 15 para 1) and the ICCPR (art 14 para 1). It also violates the protection of human dignity promoted in the ICCPR (art 10).

⁷⁰⁵ Amnesty International ‘Pakistan: Execution of minor highlights endemic problems in justice system’ 10 June 2015, available at <https://www.amnesty.org/en/latest/news/2015/06/pakistan-execution-of-minor-highlights-endemic-problems-in-justice-system/>, accessed on 31 July 2015.

⁷⁰⁶ Taqi Usmani op cit note 703 at 6.

⁷⁰⁷ Ibid at 14.

⁷⁰⁸ Shehla Zia ‘Hudud laws: Impact on women’ in Tarik Jan (ed.) *Pakistan between Secularism and Islam*, Institute of Policy Studies (1998) 327; ‘Report of the Commission of the Inquiry for Women August 1997’ 55–75.

⁷⁰⁹ Ibid at 317–37.

⁷¹⁰ Report of the Commission of Inquiry for Women (1997) 71.

⁷¹¹ Taqi Usmani op cit note 703 at 14.

⁷¹² Ibid at 11; Asad Jamal ‘Extra-judicial executions in Pakistan: Killing with impunity’ *Human Rights Commission of Pakistan*, available at <http://hrcp-web.org/hrcpweb/wp-content/pdf/ff/10.pdf>, accessed on 10 May 2016.

(b) The case of the Maliki school in Sudan

The implementation of *hudud* ordinances in Sudan in 1983 during the presidency of an-Nimeiry caused much controversy. Internationally, there was an outcry about human rights violations caused by the implementation of these ordinances.⁷¹³

The Sudanese criminal law implemented in 1991⁷¹⁴ is based on *Shariah*. In contrast to the official teaching of the Maliki school that holds to eight crimes and lists *haraba*, *qata al-tariq* and *al-baghi* separately,⁷¹⁵ the Sudanese penal code identifies only seven different *hudud* crimes, since it does not list the crime of *qata al-tariq* separately.⁷¹⁶

In the first two years following *Shariah* being made state law, the *hudud* punishment for theft (amputation) was carried out on several hundred individuals, and in 1991, it was legalised officially in Sudanese criminal law.⁷¹⁷ Amputation is one of the kinds of harsh and cruel punishments that is banned by the UDHR, the CAT, the ICCPR and the ACHPR to all of which Sudan has bound itself to.

Sudan adopted the ICCPR and the ICESCR by accession on 18 March 1986 and signed the CAT (on 4 June 1986). It also became a member of the African (Banjul) Charter on Human and Peoples' Rights (ACHPR) that was entered into force on June 1986. Sudan is also among the signatories of the CDHRI and the ACHR.

Despite its commitment to all these human rights documents, Sudan continued to practice *hudud* ordinances, thus violating many of the human rights they protect.⁷¹⁸ One of the main areas criticised by human rights activists concerns the crime of rape. The onus of proof of a rape or gang rape is borne by the female victim seeking justice. Because it is almost impossible for her to provide proof in the form of four male Muslim witnesses, she usually ends up being the one being condemned for *zina*.⁷¹⁹

⁷¹³ Al-Jazirah op cit note 686.

⁷¹⁴ Sudan Criminal Code of 1991 (in English), available at [https://www.icrc.org/ihl-nat.nsf/0/4d8b568d3792381cc12571100038b7d0/\\$FILE/Criminal%20Act%20-%20Sudan%20-%20EN.pdf](https://www.icrc.org/ihl-nat.nsf/0/4d8b568d3792381cc12571100038b7d0/$FILE/Criminal%20Act%20-%20Sudan%20-%20EN.pdf), accessed on 22 December 2015; (in Arabic) available at <http://www.wipo.int/wipolex/en/details.jsp?id=10737> accessed on 22 December 2015.

⁷¹⁵ Al-Jaziri op cit note 190 vol 5 at 12 & 13.

⁷¹⁶ Taha al-Makashifi al-Kabashi *Tatbiq al-Shariah al-Islamia fi al-Sudan beina al-Haqiqa wal Eftira* (1986) 15 & 21.

⁷¹⁷ Sudanese Criminal Law of 1991 op cit note 714 arts 171–4.

⁷¹⁸ Such as the Banjul Charter art 4 (protection of life and integrity of a person) and art 5 (ban on torture, cruel, inhuman or degrading punishment and treatment).

⁷¹⁹ Scott Siraj al-Haq Kugle 'Sexuality, diversity, and ethics in the agenda of progressive Muslims' in Omid Safi (ed) *Progressive Muslims: On Justice, Gender, and Pluralism* (2003) Oneworld Publications, Oxford, ch 8 190–234.

Martin Lau 'Twenty-five years of hudood ordinances: A review' (2007) 64 *Wash & Lee L Rev* 1291, available at <http://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/2>, accessed on 2 February 2016.

This violates several internationally protected human rights guaranteed by the UDHR, and the ICCPR and even by the CDHRI and the ACHR, including the right to life, liberty, and security of person (art 3 UDHR, art 5 para 1 ACHR), the right to justice (art 19 b CDHRI), and the right not to be subjected to arbitrary arrest, detention, or exile (art 9 UDHR).

(a) The case of the Shafei school in Brunei Darussalam

Brunei is the smallest one of all the Muslim countries that apply the tenets of the Shafei school of jurisprudence, but it is the only one of them that implements *hudud* ordinances in the entire country.

When Brunei Darussalam's new Penal Code came into force on 1 May 2014 it triggered a heated public debate inside the country and abroad,⁷²⁰ and was harshly criticised by human rights organisations. Amnesty International, for example, felt that the country had been taken 'back to the dark ages when it comes to human rights'.⁷²¹ The Deputy Asia-Pacific Director of Amnesty International called the new penal code a mockery of the country's international human rights commitments.⁷²²

Brunei, in fact, is not only among the signatories of the Cairo Declaration since 1990, but has also adopted the CEDAW in 2006, and in 2012 it also became member of the 'Association of Southeast Asian Nations' (ASEAN), at the same time reaffirming its commitment to the Universal Declaration of Human Rights and the UN Charter.⁷²³ In 2015 it signed the CAT. As a state party of several of the UN Conventions, Brunei is also bound to the UDHR that is the basis of these international human rights treaties that Brunei has signed and acceded.⁷²⁴

Despite its commitment to all these human rights documents, Brunei started the implementation of *hudud* ordinances in 2014, by incorporating Islamic laws into the existing criminal justice system.⁷²⁵ In October 2013, the new Brunei *Shariah* Penal Code was gazetted

⁷²⁰ Quratul-Ain Bandial 'Implementation of Syariah law' *The Brunei Times* 15 December 2014, available at <http://www.bt.com.bn/news-national/2014/12/15/implementation-syariah-law>, accessed on 26 November 2015.

⁷²¹ Amnesty USA 'Brunei Darussalam: Revoke new Penal Code allowing stoning, whipping and amputation' 30 April 2014, Amnesty USA, available at <http://www.amnestyusa.org/news/news-item/brunei-darussalam-revoke-new-penal-code-allowing-stoning-whipping-and-amputation>, accessed on 1 August 2015.

⁷²² Ibid.

⁷²³ 'The Universal Declaration of Human Rights' *The Brunei Project*, available at <http://www.thebruneiproject.com/the-universal-declaration-of-human-rights.html>, accessed on 30 May 2016.

⁷²⁴ 'Brunei Darussalam: Fundamental rights and freedoms violated under the new Shari'a penal code', *Women Living Under Muslim Law*, 11th November 2013, available at <http://www.wluml.org/action/brunei-darussalam-fundamental-rights-and-freedoms-violated-under-new-shari'-penal-code>, accessed on 30 May 2016.

⁷²⁵ Bandial op cit note 720.

by the Brunei government with the view to its being introduced in three phases.⁷²⁶ The first phase beginning on 1 May 2014 started with the implementation of *ta'zir* crimes punishable by fines and/or imprisonment. The offences listed under this section include failure to perform Friday prayer, disrespecting the month of Ramadan and propagating religions other than Islam.⁷²⁷ The second phase, started in 2015, covers more serious crimes and includes *qisas* and *hudud* crimes, with harsher punishments such as the amputation of limbs for theft, although the death penalty is excluded.⁷²⁸ A full enforcement of *hudud* ordinances, including death penalties, is part of phase three, that started in 2016. The so-called *Shariah* offences are tried by the *Shariah* courts, formerly limited to hear family matters like marriage and inheritance.⁷²⁹

The list of *hudud* crimes in Brunei includes seven crimes and goes beyond those held by the official Shafei school.⁷³⁰ Only the five *hudud* crimes that all schools agree on are the same. The Brunei penal code lists them as: '*zina* (adultery), *qazf* (accusation of adultery, sodomy and rape), *sariqah* (theft), *shurb* (drinking) and *hirabah* (robbery)'. Brunei does not include apostasy and rebellion as taught by the Shafei school, instead rape and homosexuality are included. The Brunei penal code refers to these crimes as *zina bil-jabar* (rape) and *liwat* (sodomy). *Liwat* refers to homosexuality, as the qur'anic term for sodomy (*luwat*) covers male same-sex activities, but does not include lesbianism. The punishments assigned by the Brunei *Shariah* penal code include amputation of the hand for theft, death or amputation of the hand/foot for robbery and stoning to death or whipping for adultery or rape.⁷³¹

The implementation of all these *hudud* punishments violates the ban on torture or to cruel, inhuman, or degrading treatment or punishment outlawed by the UDHR (art 5), the CAT (art 1 para 1) and the ASEAN (art 14).

Generally, the penal code applies to both Muslims and non-Muslims, for example in cases of theft, robbery, rape or homosexuality. Only specific offences, including apostasy,

⁷²⁶ Mohamad Tun Abdul Hamid 'Implementation of hudud in Brunei: Differences between Brunei and Malaysia', p 1 Protocol of his Public talk held on 11 February 2014 at the International Institute of Advanced Islamic Studies (IAIS), *Islam and Civilisational Renewal website*, vol 5, no 2, available at <http://www.iais.org.my/icr>, accessed on 20 November 2015.

⁷²⁷ Bandial op cit note 720.

⁷²⁸ Abdul Hamid op cit note 526 at 4–5; Quratul-Ain Bandial 'Introduction of Syariah Penal approved in Brunei' The Brunei Times/ANN 23 October 2013, available at <http://www.thejakartapost.com/news/2013/10/23/introduction-syariah-penal-approved-brunei.html>, accessed on 2 December 2015.

⁷²⁹ Bandial op cit note 720.

⁷³⁰ Brunei shari'ah penal code order (2013), available at https://www.bsp-lbd.com.bn/LBDDocuments/Syariah%20Law/Syariah_Penal_Code_Order_Summary_Final.pdf, accessed on 24 December 2015.

⁷³¹ Ibid.

adultery and drinking alcohol, are applicable only to Muslims.⁷³² Some prescriptions apply to non-Muslims only, for example, ‘contempt of the Prophet [insulting the Prophet] by non-Muslims’ and ‘deriding [disrespecting] the verses of the Qur’an or *hadith* by non-Muslims’.⁷³³ Some acts, including adultery, are considered a punishable offence, only if committed by Muslims and not by a non-Muslim with a non-Muslim.⁷³⁴ Differentiating between Muslims and non-Muslims violates the principle of equality before the law protected in the UDHR (art 7).

Even though Brunei explicitly permits other religions, including Christianity, Buddhism and Hinduism to co-exist with Islam, Brunei is a declared conservative Muslim country, and in it every Muslim has to fulfil his or her religious duties. Despite the declaration in the Brunei constitution allowing that other religions ‘may be practiced in peace and harmony in any part of Brunei Darussalam’,⁷³⁵ human rights organisations keep expressing concerns about human rights here, especially in respect of religious freedom and restrictions on non-Shafei and non-Islamic religious practice.⁷³⁶ Violations of the right to religious freedom constitute violations of the UDHR that protects this right in art 18.

(b) The case of the Hanbali school in Saudi Arabia

The teachings of the Hanbali school of jurisprudence are fully practised in Saudi Arabia, and constitute the legal basis for the Saudi judicial system. *Hudud* ordinances are incorporated into Saudi criminal law and practiced on a regular basis. The Constitution of the Kingdom of Saudi Arabia, also known as ‘the basic law of governance’, has been issued as a Royal Decree by King Fahd al-Saud and declaredly is based fully on *Shariah*.⁷³⁷ The penal code is also declaredly based on *Shariah* alone. It states that ‘[a]ny procedure which is contrary to the provisions of Islamic law or to the regulations that derived thereof, will be void’ (art 188) and

⁷³² Abdul Hamid op cit note 526 at 4–5.

⁷³³ Ibid.

⁷³⁴ Ibid.

⁷³⁵ Constitution of Brunei Darussalam, Part II, art 3 (1), available at http://www.parliament.am/library/sahmanad_rutyunner/bruneydarussalam.pdf, accessed on 18 June 2016.

⁷³⁶ ‘Amnesty International report 2014/2015: The state of the world’s human rights’ *AmnestyUSA.org* 25 February 2015, 86–87, available at <http://www.amnestyusa.org/research/reports/state-of-the-world-20142015-0>, accessed on 10 January 2016.

⁷³⁷ ‘The Basic Law of Governance’ Royal order no A/90 of 27th Sha’ban 1412 AH (1 March 1992), available at http://www.saudiembassy.net/print/about/country-information/laws/The_Basic_Law_Of_Governance.aspx, accessed on 20 August 2014; The Saudi system regulating the government issued by the Saudi royal order no 8-90 in the year Jan 1895. Saleh Bin Ali al-Otebi *Ahlan al-Hudud Asharayiah wa Aradda al-Am* (2000).

that '[a]ny judgment which violates the text of the Quran or the *Sunnah* or the consensus [*ijma*] will be invalid' (art 201). The Law of Criminal Procedure⁷³⁸ states in art 1 that

[t]he courts shall apply the provisions of *Shariah* according to the Quran and *Sunnah* to all cases that come before it. Also the provisions issued by the guardian of the judiciary system may not conflict with the Quran and *Sunnah*.

The penal code lists eight *hudud* crimes, namely theft (*sariqa*), highway robbery (*qata al-tariq*) and fighting against Allah and His Messenger (*haraba*), illicit sexual intercourse (*zina*), defamation (*al-qazf*), drinking alcohol (*shurb al-khamr*), rebellion (*al-baghi*) and apostasy (*al-riddah*).⁷³⁹ Notably, the three crimes of *haraba*, highway robbery, and rebellion are all listed individually. The punishments include the death penalty, stoning and cutting [off of hands or feet] and beating with lashes.

The enforcement of these *hudud* punishments violates the ban on torture enshrined in the UDHR and the CAT, to both of which Saudi Arabia has bound itself to. The country adopted the CAT by accession on 23 September 1997, and signed and ratified the CEDAW on 7 September 2000. Saudi Arabia is also among the signatories of the Cairo Declaration since 5 August 1990, and a state party of the ACHR (signed 1 August 2004 and ratified on 15 April 2009).

Interestingly, the Saudi penal code claims to promote the protection of human rights. Article 26 states that '[t]he State shall protect human rights in accordance with the Shari'ah'. The statement 'in accordance with *Shariah*', though, reflects that the protection of human rights is subordinated to Islamic law and is thus not contributing in any way to a protection of human rights against violations caused by *hudud* ordinances, as understood within the parameters of international law.

The constitution also seems to promote due process. Paragraph 1 of art 220 states that '[t]he sentence of death penalty, stoning or cutting [off hands or feet] cannot be carried out unless an order has been issued by the king or his assistance'; and para 2 states that: '[t]he execution of the sentence of death, stoning, cutting [off hands or feet] or flogging has to be observed by representatives of the mayor of the city, the court and the religious and local police.'⁷⁴⁰

⁷³⁸ Law of criminal procedure, Royal decree no (M/39) 28 Rajab 1422 AH [16 October 2001] *Royal Embassy of Saudi Arabia, Washington DC*, available at <http://www.saudiembassy.net/about/country-information/laws/CriminalProcedures2001-1of3.aspx>, accessed on 20 August 2014.

⁷³⁹ Shaima Atta 'Criminal law in Saudi Arabia' *Qatar Law Forum* 19 February 2010, available at <http://www.mn940.net/forum/forum29/thread8833.html>, accessed on 23 December 2015.

⁷⁴⁰ The Islamic Penal Code of Saudi Arabia op cit note 738.

Despite the above, Saudi Arabia is one of the main countries known for their human rights violations, and especially for the excessive implementation of the death penalty: The death penalty is enforced for a number of different offences, including the crimes of apostasy, adultery of married persons, consensual sexual relations between adults of same sex, and acts that are considered to be terrorism-related offence and thus as acts of *haraba* ('corruption on earth'). Saudi Arabia has one of the highest execution rates in the world. Between 1985 and 2013 more than 2000 people were executed in Saudi Arabia.⁷⁴¹ In 2015 alone at least 158 people were executed.⁷⁴²

Trial procedures in the Saudi Arabia's criminal justice system violate the aforedescribed right to a fair trial protected in the UDHR in several ways. According to Human Rights Watch reports, Saudi Arabia's criminal justice system makes it very difficult for a defendant to get a fair trial, even in capital cases. Suspects often have no access to a legal assistance.⁷⁴³ Confessions are extorted under inhuman treatment and torture and convictions may be based on forced confessions.⁷⁴⁴ Trials often take place in secret and suspects are often not informed about the different steps of their trial.⁷⁴⁵ In case of an execution, family members are often not informed when or where it will take place.

In summary, it can be said that the four representative countries that apply *hudud* ordinances according to the four Muslim Sunni schools violate human rights in many ways. In so doing, they violate their obligations to the human rights documents that they have committed themselves to. All the *hudud* punishments constitute a violation of the the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

IV Conclusion

The cases of Saudi Arabia, Sudan, Pakistan and Brunei Darussalam discussed in this chapter demonstrate that the application of *hudud* ordinances causes much conflict with international human rights laws. The main areas of criticism regard the excessive use of the death penalty,

⁷⁴¹ 'Saudi Arabia: Four family members executed for hashish possession' *Amnesty International* 18 August 2014, available at <http://www.amnesty.org.au/news/comments/35319/>, accessed on 19 August 2014.

⁷⁴² 'Death Penalty Database: Saudi Arabia' *Cornell Law school* 4 April 2011, available at <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Saudi+Arabia>, accessed on 1 June 2016.

⁷⁴³ US Departemant of State '2014 International Religious Freedom Report', available at <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2014&dlid=238476>, accessed on 11 October 2015.

⁷⁴⁴ Ibid.

⁷⁴⁵ Ibid.

even for offences that are not considered capital by international law, the practice of the harsh, cruel and humiliating punishments of flogging and amputations, as well as due process violations and discrimination on the basis of gender and religion.

Discrimination on the basis of gender or religion can be found in both the legal prescriptions of *hudud* ordinances, as well as in their practical application in Muslim countries. Discriminatory prescriptions can be found in most of the *hudud* crimes. The *zina* prescriptions, for example, discriminate against women, for the procedure of stoning makes it easy for men to escape, whilst for women escape is almost impossible. The prescriptions concerning theft discriminate against non-Muslims, for stealing from them is considered a crime less severe than stealing from a Muslim. Further, women and non-Muslims are not accepted as witnesses in *hadd* cases. Also the *qazf* prescriptions are very discriminatory, for defamation of a non-Muslim or a slave is seen as less severe than accusing a free Muslim. Furthermore, women, non-Muslims or slaves are considered not being qualified to be witnesses. If one of them testifies in a case of *zina*, not only will their testimony be ignored, but also they will be punished for *qazf* even if they did not bring forth any false accusation. Witnesses who falsely accuse women, by contrast, are not punished, even if their accusations are proven to be false.

Interestingly, *hudud* ordinances violate not only international human rights standards, but also the important principle of presumption of innocence, which is a well-known and highly valued principle in Islam, especially since the Prophet Muhammad himself stated explicitly that, in case of doubt, there shall be no *hudud* punishment. The importance of preventing the faulty conviction of a suspect can also be seen in the fact that the Qur'an has defined the act of defamation as a crime by itself. Also the requirement of four eyewitnesses to convict a suspect of the crime of *zina* can be seen in that same light, namely as aiming to prevent the faulty conviction of a suspect. Nevertheless, this principle is much violated, both in the *hudud* prescriptions themselves and in the countries that apply *hudud* ordinances. Paradoxically, it is in the prescriptions of the very crime of *qazf*, as defined by the four different schools, that justifications are given for punishing witnesses who did no wrong, just because there are not enough witnesses to testify with them, or because they are not considered trustworthy enough because of their gender or religion. Pakistan, for example, is often criticised for faulty convictions, for there are numerous cases of rape, which women do not even dare to report for fear of becoming subject to the punishment for a crime they never committed — either *qazf* or *zina*. Women who became victims of sexual violence need and deserve protection from the state, yet, instead of being protected by the law, they can easily become victims of the judicial

system. What makes it even more unjust and discriminatory is that when a woman is falsely accused of adultery and proven to be innocent, her accusers will not be punished for the crime of *qazf*, even though their testimonies are proven to be false.

The fact that *hudud* ordinances, as defined by the four Sunni schools of jurisprudence and as practiced in the four representative Muslim countries, violate the Islamic principle of presumption of innocence is a strong argument that disproves the claim that *hudud* ordinances are a divinely assigned and infallible set of crimes and punishments that cannot be questioned. It is this claim that is usually used as a justification of the enforcement of *hudud* ordinances. This chapter has demonstrated that even though all four Sunni schools agree on the notion of such a perfect set of *hudud* ordinances, they hold strongly differing views concerning their legal prescriptions. There are great differences between the four schools' understandings concerning the definition of the crimes, the punishments and the requirements for a suspect to be convicted. More importantly, though, the prescriptions that the four schools hold to, contradict many of the qur'anic prescriptions in several ways.

The disagreement between the four schools starts with the question of the correct number of *hadd* crimes to be part of the set of *hudud* ordinances, since the four schools disagree as to whether the crimes of apostasy, *haraba* and rebellion constitute *hadd* crimes or not. Not only the overlapping definitions of the crimes of *haraba*, *qata al-tariq* and *al-baghi* are very cloudy but also the prescriptions concerning the crime of drinking alcohol are very unclear and questionable. Contradictions and disagreement concerning the definition and punishment of the crime of drinking alcohol can be found both between the schools and also with the Qur'an itself.

Interestingly, as for the crime of apostasy, all four schools agree on the death penalty, whilst by doing so, they all contradict the Qur'an, for it does not assign this punishment. The punishments of stoning and exile also have no legal justification in the Qur'an.

Concerning the crime of theft, there is not only much disagreement between the four schools as to the punishment of repeat offenders, but also all four schools go beyond the qur'anic prescriptions with their punishment of the amputation of feet, which is not mentioned in the Qur'an. They also, interestingly enough, agree that imprisonment is the last option, even though this penalty is not mentioned in the Qur'an. Surprisingly, they chose the least severe punishment as the last option, whilst usually the punishment for repeat offenders is more severe than for first offenders. It would be more logical and more humane to choose the option of imprisonment as the first option, not the last. In the example of theft, it can also be seen very clearly how wide the range of the different positions is in dealing with the

individual *hadd* crimes and their punishments. The harshest position concerning theft assigns the cruel punishment of amputations for repeat offences, going as far as cutting off both hands and feet. However, there exists the option to forgive the offender if he repents, or to avert the *hudud* punishment if there is any case of doubt, for example, if the thief is very poor or if a country's economic difficulties justify that.

The fact that there is so much disagreement between the different schools of jurisprudence concerning the allegedly divinely prescribed *hudud* ordinances demonstrates how weak and questionable these prescriptions are. Interestingly, none of the four schools sticks to the qur'anic prescriptions concerning the *hadd* punishments, but all assign punishments that have no legal justification in the Qur'an. The argument that *hudud* ordinances are divine, infallible and non-negotiable can thus be refuted, the more so because they even contradict the qur'anic prescriptions.

This thesis argues, therefore, that there is a great need to reform *hudud* ordinances. Among the reasons for this is that they violate human rights and are the source of opprobrium from the non-Muslim world, thereby damaging the reputation of Islam internationally. The following chapter discusses the importance of reformation from an Islamic perspective.

CHAPTER 5

THE CONCEPT OF REFORMATION IN ISLAM

I Introduction

The fact that Islamic law, particularly the *hudud* ordinances with their harsh and cruel punishments, clash significantly with internationally recognised human rights laws, has been discussed in depth in the previous chapters of this thesis. It has further been pointed out that many moderate Muslims call for reforming *hudud* ordinances by re-interpreting the primary sources of *Shariah*, the Qur'an and *Sunnah*. Orthodox Muslims, however, consider the idea of reforming them as blasphemy, since they view *hudud* ordinances as divine and infallible. Since the notion of 'reforming' is generally understood as modernising what seems to be outdated, orthodox Muslims presumably view the approach of many moderate Muslims as an attempt to compromise and violate *Shariah*. The truth, however, is that *Shariah* itself speaks a great deal about reformation and introduces it as a call to Muslims to renew their faith and restore the religion to its genuine condition as initially designed by its creator.

In this chapter religious texts of the Qur'an and *Sunnah* pertinent to the topic of reformation are discussed. One of these is Allah's promise to send reformers on a regular basis to renew the religion.⁷⁴⁶ A particular focus is on the famous Farewell Sermon of the Prophet. This famous speech points out that Muslims of today might be able to understand *Shariah* even better than did their co-religionists of the Prophet's time.⁷⁴⁷ Further, the Prophet stresses the importance of abiding by the teachings of the Qur'an and the *Sunnah* as the ultimate guidelines for Muslims. The sermon can be understood as a call to Muslims of all times, including those of today, to examine and verify for themselves what *Shariah* really teaches, thus to practice *ijtihad*.⁷⁴⁸ From this, it can be concluded that a Muslim's ultimate aim should be to examine Islamic law in the light of the Qur'an and the *Sunnah* and, if necessary, re-interpret them while taking its core values into account.⁷⁴⁹ These values are articulated in the last sermon, and are to be discussed in this chapter.

When exploring the Islamic concept of reformation as introduced in the Qur'an, the notions of *islah* (restoration), *tagyir* (change), *tajdid* (renewal), and *ehyah* (revival) are examined. The discussion of this concept, as reflected in the Qur'an and the *Sunnah*, demonstrates that both of these primary sources describe reformation as an essential mechanism to guarantee the survival of Islam by keeping it fresh and appropriate for Muslims' life circumstances and to the reality of the changing environment in which they live, regardless of when they live(d).⁷⁵⁰ This chapter demonstrates that *Shariah* presents Islam as a living organism rather than a rigid and unchangeable system. It is argued, further, that the call for reformation and restoration can be understood as a call to clear Islamic law, including *hudud* ordinances, from those prescriptions that have been developed by the human effort of Islamic jurists and that have no legal justification in the Qur'an. This is particularly so if they contradict the Qur'an, as is the case, for example, with the punishment for apostasy.

This chapter also discusses the purposes of *Shariah* (*maqased al-Shariah*), the primary one of which is to benefit the people and to protect them from harm. With the aim of protecting these purposes, *Shariah* provides two important principles, namely the jurisprudence of reality (*fiqh al-waqa*) and that of necessity (*fiqh al-darurah*). According to these two principles, under exceptional circumstances what is prohibited can be permitted, namely, if there is a necessity that requires a person or people to secure the benefit of the

⁷⁴⁶ Muhammad Nasir ad-Din al-Albani *Silsilat al-Ahadith al-Sahihah* (1995) vol 2 at 148 no 599.

⁷⁴⁷ Al-Qaradawi op cit note 68 at 30.

⁷⁴⁸ Ibn Hajar al-Asqalani op cit note 556 at vol 1 at 191.

⁷⁴⁹ Muhammad Salim al-Awa *Al-Fiqh al-Islami fi Tariq al-Tajdid* 3 ed (2006) 52.

⁷⁵⁰ Mohamed Osman Shabir *Al-Takyif al-Fiqhi wa Tadbiquatuhu al-Amaliyah ala al-Waqae al-Mustajadah* (2014) 6.

people, or if the reality of life requires it. The discussion of these two principles gives evidence of *Shariah*'s flexibility and the richness of the tools available to Islamic jurists in developing rulings appropriate for twenty-first century Muslims.

This chapter also looks at the two main obstacles preventing Islamic jurists from amending *hudud* ordinances. The first of these is the fact that the protection of religion has a predominant role in Islam. This view derives from a reading of the concept of the five indispensables that elevates the protection of religion above the protection of the other four indispensables that protect individuals' rights. It is argued in this chapter that this reading is incorrect, and that human efforts to protect the religion by violating the benefit of the people, thus violate *Shariah*. The second obstacle is the claim that *hudud* ordinances concern the right of Allah and can therefore not be forgiven or amended by anyone else besides Allah himself. This chapter refutes this claim on several grounds and points out to evidences in the Qur'an and *Sunnah* that stresses Allah's desire to forgive and to make it easy for the people.

This chapter thus demonstrates that it is Islamically legitimate and necessary to reform *hudud* ordinances to clear them from interpretations that are in conflict with the primary sources of *Shariah*, its purposes and its core values. In doing so, this chapter prepares the ground for Chapter 6 that aims to apply the principles of necessity and reality to reconcile *hudud* ordinances with international human rights law.

II The concept of reformation in the Qur'an and the *Sunnah*

The Qur'an and the *Sunnah* contain many texts that speak explicitly or implicitly about reformation. The Arabic term for reform is *islah*. This means to restore, repair or improve something that has been corrupted or broken, or to bring something from a bad condition to a good condition.⁷⁵¹ Al-Ragaeb al-Asfahani interpreted the term 'reform' as 'the good against bad'.⁷⁵² The Qur'an discusses the Islamic concept of reform in a broader scope than the Arabic language itself, using in addition to the term *islah* (restoration), also the terms *tajdid* (renewal), *ehyah* (revival) and *tagyir* (change) to describe the idea of reformation and the connected aspect of positive change.

The following *hadith*, for example, which is one of the key texts in the *Sunnah* concerning reformation, reports about a promise of Allah to send His people reformers on a regular basis.

⁷⁵¹ Al-Raghib al-Asfahani *Al-Mufradat fi Gharib al-Qur'an* (1412 AH) 489.

⁷⁵² Ibid.

(a) Allah's promise to send reformers

According to this *hadith*, as narrated by Abu Hurairah, the Prophet said: ‘God will send to this nation (Muslims) at the head of every hundred years someone to renew its religion (Islam).’⁷⁵³ The main notion conveyed in this *hadith* is that the religion needs to be renewed on a regular basis in order to be revitalised. It is important to note that the ‘renewal’ of the religion, mentioned in this *hadith* does not imply changing *Shariah*, but refers to a call upon Muslims to return to the religion and to bring their lives into compliance with *Shariah*.⁷⁵⁴ Islamic jurists refer to this person both as *mujaddid*, thus a person who brings *tajdid* (renewal), and as *musleh*, a person who brings *islah* (reform).⁷⁵⁵ The hundred-year period mentioned in the *hadith* does not necessarily refer to a specific period of time, but can be understood as referring to the concept of continuity and recurrence on regular basis.⁷⁵⁶

Islamic scholars agree that this *hadith* does not speak about prophets but about reformers.⁷⁵⁷ It can be understood as speaking about religious leaders who have the gift and ability to bring new inspiration to the believers, to call them back to God and to present the message of God to them in a fresh way, one that is relevant to their lives.⁷⁵⁸ The majority of Islamic scholars believe that the *hadith* refers to individuals who can be identified as reformers,⁷⁵⁹ whilst other scholars believe that it could as well refer to a collective. Some scholars, including Ibn Kathir, believe that this *hadith* must refer to Islamic scholars, since reformation can be done only by Muslim scholars who carry the knowledge of Islam.⁷⁶⁰ Some Muslim scholars have attempted to identify the specific reformers to which this *hadith* is referring. Sunni Muslims, for example, believe that Caliph Umar Ibn Abdel Azis was one of the *mujaddidin*,⁷⁶¹ as was Jamal al-Din al-Afghani.⁷⁶² During the rise of the Iranian Islamic revolution in the late 1970s, Shia Muslims — and even many Sunni Muslims — were convinced that the leader of the revolution, Ayatollah Khomeini, was one of the reformers

⁷⁵³ Al-Albani op cit note 746.

⁷⁵⁴ Seif-al-Din Abdul Fatah 'The renewal', available at <http://arabi21.com/story/822581/> accessed on 7 April 2015.

⁷⁵⁵ Abdel Metaal al-Saidi *Al-Mujadedun fi al-Islam min al-Qarn al-Awal ela al-Qarn al-Rabea Ashar* (1996) 14.

⁷⁵⁶ Abdul Fatah op cit note 754.

⁷⁵⁷ Adnan Mohammed Umaamah *Al-Tajdid fi al- Fikr al Islami* (2001) 62.

⁷⁵⁸ Al-Azim al-Abadi *Awn al-Maabud Sharh Sunan Abu Dawud* (2009) 1841.

⁷⁵⁹ Ibn Hajar al-Asqalani *Fath al-Bari fi Sharh Sahih al-Bukhari* (1995) vol 13 at 308.

⁷⁶⁰ Mohammed Bin Abdul Rahman Bin Mohammed al-Sakhawy *Al-Maqased al-Hassanah Fima Eshtuhera ala al-Alsenah* (1985) no 235.

⁷⁶¹ Al-Abadi op cit note 758.

⁷⁶² Zahid Roussin 'Manhag al-Afghani al-aqli fi defauho an al-Islam' (2008) *Magalat Gameat Demasheq*, vol 24 at 388, no1 & 2, available at <http://www.damascusuniversity.edu.sy/mag/human/images/stories/3530000.pdf>, accessed on 5 November 2015.

that the said *hadith* speaks about.⁷⁶³ Regardless of the question of the identity of the reformers mentioned in the *hadith*, the key message that can be understood from it is the notion that reformation is a life force for Islam as is the air to breathe for a human being.⁷⁶⁴

The notion that the message of God needs to be refreshed and re-read in the context of the reality of life of each new generation can also be seen in the famous Farewell Sermon of the Prophet Muhammad.

(b) The Farewell Sermon of the Prophet Muhammad

The famous Farewell Sermon (*khutab al-wada*) of the Prophet Muhammad⁷⁶⁵ that he preached just before his death, in 632 AD, can be seen as one of the key texts on reformation, for it presents and explains the call for it. The Prophet commenced his sermon by pointing out its great importance and calling his audience to transmit his message to all those Muslims who could not hear his words directly:

⁷⁶³ Mohamed Hassanein Heikal *Madafia Ayatollah: Qisat Iran al-Thaura* 6 ed (2002) 167.

⁷⁶⁴ Roussin op cit note 762.

⁷⁶⁵ After praising, and thanking Allah he said: "O People, lend me an attentive ear, for I know not whether after this year, I shall ever be amongst you again. Therefore listen to what I am saying to you very carefully and TAKE THESE WORDS TO THOSE WHO COULD NOT BE PRESENT HERE TODAY.

O People, just as you regard this month, this day, this city as Sacred, so regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners. Hurt no one so that no one may hurt you. Remember that you will indeed meet your LORD, and that HE will indeed reckon your deeds. ALLAH has forbidden you to take usury (interest), therefore all interest obligation shall henceforth be waived. Your capital, however, is yours to keep. You will neither inflict nor suffer any inequity. Allah has Judged that there shall be no interest and that all the interest due to Abbas ibn 'Abd'al Muttalib (Prophet's uncle) shall henceforth be waived...

Beware of Satan, for the safety of your religion. He has lost all hope that he will ever be able to lead you astray in big things, so beware of following him in small things.

O People, it is true that you have certain rights with regard to your women, but they also have rights over you. Remember that you have taken them as your wives only under Allah's trust and with His permission. If they abide by your right then to them belongs the right to be fed and clothed in kindness. Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they do not make friends with any one of whom you do not approve, as well as never to be unchaste.

O People, listen to me in earnest, worship ALLAH, say your five daily prayers (Salah), fast during the month of Ramadan, and give your wealth in Zakat. Perform Hajj if you can afford to.

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety (taqwa) and good action. Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly. Do not, therefore, do injustice to yourselves.

Remember, one day you will appear before ALLAH and answer your deeds. So beware, do not stray from the path of righteousness after I am gone.

O People, NO PROPHET OR APOSTLE WILL COME AFTER ME AND NO NEW FAITH WILL BE BORN. Reason well, therefore, O People, and understand words which I convey to you. I leave behind me two things, the QURAN and my example, the SUNNAH and if you follow these you will never go astray. All those who listen to me shall pass on my words to others and those to others again; and may the last ones understand my words better than those who listen to me directly. Be my witness, O ALLAH, that I have conveyed your message to your people". See 'The Last Sermon (Khutbah) of Prophet Muhammad (Farewell Sermon)' (English translation of the sermon) op cit note 34.

O People! Lend me an attentive ear, for I do not know whether after this year I shall ever be amongst you again. Therefore, listen carefully to what I am saying and Take These Words to Those Who Could Not Be Present Here Today.

One of the main points communicated in this important speech is the statement of the Prophet stressing that the Qur'an and the *Sunnah* are given as the ultimate guidelines for Muslims.⁷⁶⁶

The Prophet called his followers to abide closely to their teachings:

Reason well, therefore, O People, and understand words which I convey to you. I leave behind me two things, the QUR'AN and my example, the *SUNNAH*, and if you follow these you will never go astray.

Further, the Prophet pointed out the core values of Islam, and urged his followers to keep, follow and protect them.⁷⁶⁷ The core values that will be discussed in more depth later in this section include justice, the protection of life and property and a spirit of brotherhood.

When the Prophet reminded the people present to pass his message on to all Muslims, from generation to generation, he expressed his hope that 'the last ones' may be able to understand his words even better than the Muslims of his own time.⁷⁶⁸

All those who listen to me shall pass on my words to others and those to others again; and may the last ones understand my words better than those who listen to me directly.

This statement of the Prophet is of crucial importance, because it conveys the message that Muslims of later generations might have an even better understanding of his message than those of his own time.⁷⁶⁹ This implies that the right and the ability to understand and interpret the teachings of *Shariah* do not belong to the first generation of Muslims only, but that Muslims of all generations are urged to strive to understand the message found in *Shariah's* primary sources, thus practicing *ijtihad*.⁷⁷⁰ This is among several texts in the Qur'an and the *Sunnah* that speak about the necessity and the right of Muslims of all generations to interpret the primary sources of *Shariah* and to apply them to their own time and circumstances.⁷⁷¹ As mentioned in Chapter 2, *ijtihad* can be described as the mechanism used to implement the teachings of the primary sources to all the practical legal questions that arise in the life of the Muslim society.⁷⁷² The Prophet repeatedly encouraged Muslims to apply their own opinion

⁷⁶⁶ Ismail Ibn Umar Ibn Kathir *Al-Fusul fi Eghtesar Serat al-Rassul* (2010) 214–18.

⁷⁶⁷ Ibn Jarir al-Tabari *Tarikh al-Tabari* 2 ed (1969) 148–52.

⁷⁶⁸ *Sahih al-Bukhari* (1997) vol 2 at 450 no 1739.

⁷⁶⁹ Almuafiri Ibn Hisham *Al-Sirah al-Nabawiyah* 2 ed (2009) 641–2.

⁷⁷⁰ Al-Qaradawi op cit note 68 at 30.

⁷⁷¹ Al-Alwani op cit note 17 at 62.

⁷⁷² One of the first examples of the application of *ijtihad* is a *hadith* that reports about the Prophet's companion Mu'az who was sent to Yemen to rule the Muslim community there. When Mu'az explained that he would rule all legal cases according to the book of Allah and if he would not find an answer in the Qur'an, he would use the *Sunnah*, and if he could not find an answer in the *Sunnah*, he would apply his own opinion and apply *ijtihad*, the Prophet praised him for this approach. Al-Qaradawi op cit note 131; Ibn al-Qayyim al-Jawziyyah op cit note 36.

and to listen to their heart.⁷⁷³ One *hadith* states, for example, that any effort made to apply *ijtihad* is honourable⁷⁷⁴ and praiseworthy and will be rewarded — even if the interpretation is wrong; and if it is correct it will be doubly rewarded.⁷⁷⁵ It can be concluded that Muslims, therefore, should not rely on the interpretations of early scholars or traditions only, but they should consider the teachings of the Qur'an and the *Sunnah* to find out for themselves how to understand them in their own context.⁷⁷⁶ It is argued here that this implies the necessity and the right of contemporary Muslims to re-interpret the primary sources of *Shariah* and to apply them to their own time and circumstances, since contemporary Muslims know best how to apply the message of the primary sources in a way to fit with their time.⁷⁷⁷ According to the Islamic principle of *ikhtilaf*, different opinions and interpretations are seen as important because it creates an environment of pluralism and diversity, which is considered beneficial for a Muslim society.⁷⁷⁸ Since Muslims of today live in a completely different environment and reality from that of Muslims of the seventh century, they have to deal with challenges that were unknown to the early scholars.⁷⁷⁹ It can be concluded that Muslims of today are called to do *ijtihad*.⁷⁸⁰ They should examine the rulings of Islamic law and verify them in the light of the Qur'an and the *Sunnah* and the Islamic core values presented in them. These core values have been pointed out by the Prophet Muhammad in his Farewell Sermon as follows:

i. Life and property

The first core value that the Prophet pointed out to in his final sermon is the sanctity of human life. The Prophet explained that human life and property are sacred and holy.⁷⁸¹

⁷⁷³ 'Consult your soul, consult your heart. Righteousness is what is satisfying to your soul and your heart. Sin is what wavers in your soul and causes hesitancy in your chest, even if the people give you a judgment, and again give you a judgment.' Abdul Azim Abdul Qawi Al-Munziri *Al-Targhib wal-Tarhib* (2003) vol 2 at 557.

⁷⁷⁴ Ibn Ashour op cit note 132 at 408.

⁷⁷⁵ *Sahih al-Bukhari* (1997) vol 9 at 271 *hadith* 7352.

⁷⁷⁶ Even though throughout the Islamic history there have been some Islamic scholars who claim(ed) that 'the door of *ijtihad* has been closed', there is no general consensus on this view. Many scholars agree that '*ijtihaad* is an integral part of Islamic legal theory' and they believe in '*ijtihaad*'s importance in Muslim's daily life'. Salih Kesgin op cit note 134.

⁷⁷⁷ Ibid.

⁷⁷⁸ The principle of *ikhtilaf* is based on a statement of the fifth caliph, Umar Ibn Abd al-Aziz, who declared that it was more beneficial for the Muslim community that the companions of the Prophet did not all have the same opinion. He explained that lack of diversity would cause hardship to the Muslim people. See Ibn Abd al-Bar *Jamea bayan al-Elm wa fadluh* (1994) vol 2 at 161 Dar Ibn al-Juzy, Al-Damam.

⁷⁷⁹ Al-Gharbawi op cit note 14 at 10.

⁷⁸⁰ Abdul Salam Figo 'Al-ijtihad wa daruratuhu fi al-asser al-hader' *Majalat Dawat al-Haq*, no 283, April 1991, Rabat, Morocco.

⁷⁸¹ *Sahih al-Bukhari* (1997) vol 2 at 450 no 1739.

In both the Qur'an and the *Sunnah*, the protection of life is accorded an extremely high priority. The Qur'an and the *Sunnah* make it very clear that the call of Allah and His Messenger is a call to live.⁷⁸² This implies that no one has the right to take the life of others, let alone commit suicide. Since the protection of life is given so much importance, killing an innocent life is consequently clearly rejected. Killing is considered an act of corruption on earth. According to a correct *hadith* narrated by Abu Hurairah, the Prophet said that whoever kills himself will suffer tremendously in hell for all eternity.⁷⁸³ This matches the teaching of the Qur'an that says that no one has the right to kill others or themselves, since Allah has made life sacred (Surah 6:151, 4:29).⁷⁸⁴ The Qur'an makes it clear that Allah is the only one who has the right over life and who can take it away, since he is the creator who gave life — the sovereign God who has the ultimate authority over life and death (Surah 22:66, 36:78–9).⁷⁸⁵ Surah 2:164 points out that Allah, as the creator of the universe, is the one who gives life on earth, including by sending rain to a dead land.⁷⁸⁶ It is only He who can bring the dead back to life (Surah 2:73).⁷⁸⁷ Surah 5:32 states that if a man kills an innocent person, it is the equivalent of the killing of all humankind. The same verse declares that when a man protects the life of his fellow men this act is considered the equivalent of giving a new life to all humankind or having resurrected all the dead.⁷⁸⁸ It is for this reason that Allah cancelled the pre-Arabian tradition of burying babies alive. The Qur'an says that on resurrection day Allah will ask these babies who did this to them, thus illustrating how angry He was about the killing of innocent lives (Surah 81:8–9). This is an important aspect that should always be kept in mind by anyone who deals with Islamic criminal law⁷⁸⁹ and — especially — with the death penalties that have been prescribed by Islamic jurists and that are not legally justified in the Qur'an or the *Sunnah*.⁷⁹⁰ Life is sacred and no one has the right to take that of another, except for *Shariah* prescribed reasons.⁷⁹¹ Muslims are challenged by the Prophet's last sermon

⁷⁸² Surah 8:24.

⁷⁸³ *Sahih Muslim* English translation (2007) vol 1 at 196 *hadith* 300.

⁷⁸⁴ Surah 6:151 ...take not life, which Allah hath made sacred, except by way of justice and law...; Surah 4:29.

⁷⁸⁵ Surah 22:66; Surah 36:78–9.

⁷⁸⁶ Surah 2:164.

⁷⁸⁷ Surah 2:73.

⁷⁸⁸ Surah 5:32.

⁷⁸⁹ Salih Bin Fawzan al-Fawzan 'Tahrem qatel al-nafs wal jenayah aliha' *Tariq al-Islam* 17 December 2011, available at <http://ar.islamway.net/article/9262/>, accessed on 7 November 2015.

⁷⁹⁰ Abdul Rahim 'Alam, rajm al-zani akbar garemah fi haq al-den wal inssan' *Hespress* 16 July 2012, available at <http://www.hespress.com/writers/58407.html>, accessed on 7 November 2015.

⁷⁹¹ Exceptional cases where killing is permitted are, for example, the *qisas* punishment for murder or the *haraba* punishment.

to understand for themselves what the will of Allah really is.⁷⁹² Since the protection of life is stressed in both the Qur'an and in the *Sunnah*, the will of Allah on this matter is clear. It is, therefore, the responsibility of Muslims of today to place the teachings of the Qur'an and the *Sunnah* above contradictory prescriptions that have been developed by Islamic jurists.⁷⁹³

The protection of property mentioned by the Prophet in his last sermon is also given priority, both in the Qur'an and the *Sunnah*. This is why the Prophet instructs his audience to '[r]eturn the goods entrusted to you to their rightful owners'.⁷⁹⁴ This injunction can also be seen in a correct *hadith* that calls for the return of entrusted goods to their rightful owner and condemns a failure to do so.⁷⁹⁵ This is also iterated in Surah 4:58, where the action of knowingly misappropriating entrusted things is viewed in the same way as a betrayal of Allah or His Messenger.⁷⁹⁶

After having dealt with the duty of Muslims to protect life and property, the Prophet calls for people to be protected from physical harm and suffering.⁷⁹⁷ This can be compared to protection from torture and cruel and inhuman punishment that is outlawed by international human rights laws. The Prophet further points out that Allah Himself will take into account any violation of these rights in the afterlife: 'Remember that you will indeed meet your LORD, and that he will indeed reckon your deeds.' This reflects the qur'anic warning concerning the crime of apostasy where Allah points out that He will hold apostates accountable in the afterlife.⁷⁹⁸

It is argued that Muslim scholars of today who are committed to carrying out the will of Allah and to following His Prophet, should take to heart what the Prophet requested in his last sermon and abide by the teachings of the Qur'an and the *Sunnah*. If they do so, and examine the *hudud* ordinances in the light of the Qur'an and the *Sunnah* and their core values, they will be able to see the contradictions between the rulings developed by Islamic jurists and the teaching of *Shariah*.⁷⁹⁹ In respect of the crime of apostasy, for example, the prescription of the

⁷⁹² *Sahih al-Bukhari* (1997) vol 2 at 450 no 1739.

⁷⁹³ Al-Qaradawi op cit note 68 at 56.

⁷⁹⁴ *Sahih al-Bukhari* (1997) vol 2 at 450 no 1739.

⁷⁹⁵ 'It was narrated from Abu Hurairah that the Messenger of Allah said: "The signs of the hypocrite are three: When he speaks he lies, when he makes a promise he breaks it, and when he is entrusted with something he betrays that trust."' *Sahih Muslim* English translation (2007) vol 1 at 156 *hadith* 211.

⁷⁹⁶ Surah 4:58; Surah 8:27.

⁷⁹⁷ *Sahih al-Bukhari* (1997) vol 2 at 450 no 1739.

⁷⁹⁸ Surah 2:217.

⁷⁹⁹ See Chapter 3 of this thesis.

death penalty by execution violates Allah's call to protect life and ignores the fact that He decided to judge this crime in the afterlife.⁸⁰⁰

ii. Women's dignity and rights

The last sermon of the Prophet also speaks of the protection of women's dignity and rights. The Prophet called men to treat women well, with kindness, fairness and justice and promotes mutual respect and care for each other. The Prophet further points out that both men and women have specific rights and obligations. It is contended here that this refers to the equality of men and women, for this reflects what is empathised in Qur'an.

The Qur'an promotes equality between men and women in dignity and rights by pointing out that both men and women have been created from the same nature.⁸⁰¹ It points out that since they are created from the same nature they deserve to be mutually respected and their relationship should be based on love, respect and care.⁸⁰² The Qur'an, further, declares that both genders have equal right to participate in leadership and government.⁸⁰³

The view of many orthodox Muslims who believe that men are superior to women is mainly based on a reading of Surah 4:34, a verse that can indeed be interpreted in different ways. The two Arabic terms that led to the differences in the interpretations are *qawamuna* and *fadala*. The aspect of 'superiority' is implied in the term *fadala* that translates as 'prefer, choose, excel, surpass or outshine'. The term *qawamuna* literally means 'to be in charge of'. Picktal's translation that is the closest to its literal meaning, says: 'Men are in charge of women, because Allah hath made men the one of them to excel the other.' It is important to note, though, that the verse does not (necessarily) refer to superiority in dignity or rights. It is actually more likely that it refers rather to the financial superiority of men. When the cultural and economic environment of the seventh century is taken into account, where men were the only caretakers and providers of a family, this understanding seems very convincing.⁸⁰⁴ Most Qur'anic translators seem to agree on this understanding, for this is what is reflected in the different English translations that describe a man's role as the provider, maintainer and protector of the family. When considering the aforementioned cultural and economic context, Asad's translation seems a good interpretation of the real meaning of the verse: 'Men shall

⁸⁰⁰ Nabil Qarqur 'Huriyat al-mutaqad wa hukm al-riddah fi al-Shariah al-Islamiyah' *Magalat al-Muntada al-Qanuni* 5 (2013) 5 254.

⁸⁰¹ Surah 4:1 and Surah 7:189.

⁸⁰² Surah 7:189.

⁸⁰³ Surah 9:71.

⁸⁰⁴ Mohammad Sohail Tqosh *Tarikh al-Arab Qabla al-Islam* (2009) 175.

take full care of women with the bounties which God has bestowed more abundantly on the former than on the latter, and with what they may spend out of their possessions.’ In addition, Picktal confirms that the verse refers to this economical aspect, when he points out that men ‘spend of their property (for the support of women)’.

The interpretation of Surah 4:34 as a justification of men’s superiority has also been refuted by the famous Egyptian Al-Azhar scholar, Sheikh Mitwali al-Sharawi, who argued for the equality between men and women by pointing to Surah 4:32⁸⁰⁵ and to the statement of the Prophet in his last sermon as evidence of this.⁸⁰⁶

The main argument, though, to refute the superiority of men and to support the equality of men and women, are the aforementioned qur’anic verses that point out that men and women are equal in dignity and rights since they are created from the same nature.

iii. Justice without discrimination

Another core value mentioned in the Prophet’s last sermon was that of fairness and justice without discrimination.⁸⁰⁷ The Prophet calls his people to treat each other justly: ‘Treat others justly so that no one would be unjust to you.’⁸⁰⁸ It is noteworthy that such just treatment should apply to both Muslims and non-Muslims, and thus can be considered non-discriminatory, since the Prophet called people to treat everyone justly and fairly — regardless of nationality, religion, colour, language, race or gender.⁸⁰⁹ This is stated explicitly by the Prophet, who points out that since ‘[a]ll mankind is from Adam and Eve’, no one is superior to others, whether they be Arab or non-Arab or black or white.⁸¹⁰ Such a call to treat all without discrimination can also be seen in a correct *hadith* narrated by Abdullah Ibn Omr. Here the Prophet Muhammad is quoted saying that the best part of Islam is to feed the poor and to greet all people with peace whether you know them or not.⁸¹¹ ‘[W]hether you know them or not’, makes it clear that all people should be treated the same.

⁸⁰⁵ Surah 4:32 (Asad) ‘Men shall have a benefit from what they earn, and women shall have a benefit from what they earn. ...’

⁸⁰⁶ Muhammad Metwali al-Sharawi *Khawater Haula al-Quran al-Karim* (1991) vol 4 at 2195.

⁸⁰⁷ Ibn Kathir op cit note 766 at 214–18.

⁸⁰⁸ Ibn Hisham op cit note 769.

⁸⁰⁹ Al-Tabari op cit note 767.

⁸¹⁰ Safey al-Din al-Mubarakfuri *Al-Rahiq al-Maghtum: Bahth fi al-Serah al-Nabawiyah* (2007) 458–62.

⁸¹¹ ‘It was narrated from ‘Abdullah Bin ‘Amr that a man asked the Messenger of Allah: “What part of Islam is best?” He said: “To feed others, and to greet with peace those whom you know and those whom you do not know.”’ *Sahih Muslim* English translation (2007) vol 1 at 136–7 *hadith* 160.

The Qur'an points out that the call to justice has been communicated at all times through the different prophets and Messengers.⁸¹² It was always the key topic in pre-Muhammed prophetic messages.⁸¹³ Allah explains that He sent His Messengers with signs and with guidelines to help His people live in justice.⁸¹⁴ This is iterated in Surah 5:8, in which Allah calls His people to be just and fair even when facing hatred and hostility.

iv. Spirit of brotherhood

Another key aspect that the Prophet points out in his last sermon is the call to brotherhood. The concept of brotherhood was quite revolutionary for its time, since it represented a new concept of social life that Islam brought to the Arabian Peninsula.⁸¹⁵ It was a call to give up the traditional tribal hostilities and to treat each other in a spirit of brotherhood.⁸¹⁶ This teaching established peace and justice amongst the community. In first instance, the call to brotherhood was a call to Muslims to treat each other fairly and justly:

‘Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly.⁸¹⁷ Do not, therefore, do injustice to yourselves.’⁸¹⁸

The next level was the call to be fair and friendly to everyone, regardless of his or her religion. In a correct *hadith* narrated by Abu Hurairah, Allah warns of hostility with one's neighbour (regardless of religion):⁸¹⁹ 'He will not enter Paradise, whose neighbour is not safe from his evil conduct.'⁸²⁰ Another correct *hadith* reports that the Prophet Muhammad realized that the revelations he received concerning the right attitude towards one's neighbour increasingly called to treat each other in a spirit of brotherhood, to such an extent that at some point he declared that he would not be surprised if the next revelation would call people to share their inheritance with their neighbour.⁸²¹

⁸¹² Ali Mohyi al-Din al-Qaradaghi 'Al-adel fi al-Quran' *Qaradaghi.com* 14 July 2009, available at http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=608:2009-07-14-14-07-53&catid=107:---q-q---&Itemid=13, accessed on 7 November 2015.

⁸¹³ Yusuf al-Qaradawi 'Justice', *Qaradawi.net* 26 October 2015, available at <http://qaradawi.net/new/articles/6349-2015-10-26-03-45-10>, accessed on 7 November 2015.

⁸¹⁴ Surah 57:25; Surah 7:29.

⁸¹⁵ Khalid Mustafa 'Huquq al-eghuah al-islamayah wal inssaneyah' *Manaratweb.com* 20 October 2015, available at <http://www.manaratweb.com/الحوقوق-الاسلامية-والانسانية-الاسلامية-الاسلامية/>, accessed on 7 November 2015.

⁸¹⁶ Surah 3:103.

⁸¹⁷ Al-Tabari op cit note 767.

⁸¹⁸ Ibn Kathir op cit note 766.

⁸¹⁹ Ali Ahmed Abdel al-Tahtawy *Shareh Kitab Haq al-Jar lel Imam al-Zahabi* (2005) 18.

⁸²⁰ *Sahih Muslim* English translation (2007) vol 1 at 141 *hadith* 172.

⁸²¹ Al-Tahtawy op cit note 819 at 7.

Muslims of today, who are striving to apply the message of the Prophet appropriately in the twenty-first century, may therefore ask themselves in which areas they should give up their traditional hostilities and instead act in a spirit of brotherhood so that peace and justice may be established.

As can be seen from the above information, the core values of the Qur'an and the *Sunnah* that the Prophet Muhammad points out in his Farewell Sermon, have much in common with the internationally protected human rights:⁸²² the protection of life and property, the ban of discrimination and the promotion of equal rights and dignity for women are some of the very basic and important key values shared by both the primary sources of *Shariah* and international human rights law.⁸²³ It is these values that the Prophet Muhammad declared to be the ultimate guidelines for all Muslims at all times.

In his Farewell Sermon, the Prophet Muhammad calls on people to abide by the teachings of the Qur'an and the *Sunnah* and the Islamic core values. This can be understood as an appeal to contemporary Muslims to examine the prescriptions of Islamic law, including the *hudud* prescriptions as developed by Islamic jurists, in the light of the abovementioned sources and the core values promoted in them.

The need to restore and renew the religion articulated in the Farewell Sermon of the Prophet and in Allah's promise to send reformers on a regular basis is a key topic that often appears in the Qur'an, as can be seen in the following section.

(c) Reformation in the Qur'an

The Islamic concept of reformation, as introduced in the Qur'an, includes the notions of *islah* (restoration), *ehyah* (revival), *tagyir* (change), and *tajdid* (renewal). All of these refer to Allah's call to Muslims to reform their lives by turning away from evil ways and to start living according to the core values of their faith, doing good, acting justly, giving charity, and caring for orphans.⁸²⁴ This includes a call to restore and reconcile relationships and to forgive each other.⁸²⁵ The Qur'an points out that forgiveness and reconciliation leads to peace and harmony and is much better than taking revenge.⁸²⁶ Anyone who practices forgiveness and

⁸²² Nassir Bin Butte Bin Nassir al-Khalidi *Huquq al-Inssan fi Khutbat al-Wadae* (unpublished MA thesis, Gamieat Nayif al-Arabia Lel-Eluum al-Amniyah, Riyadh, 2010) 177.

⁸²³ CEDAW arts 1–4, 15; UDHR arts 1–3.

⁸²⁴ Surah 2:83; Surah 4:8.

⁸²⁵ Surah 4:114, Surah 49:10.

⁸²⁶ Surah 8:1; Surah 42:40.

reconciliation is promised a good reward by Allah.⁸²⁷ Those who do good to others are promised a good life.⁸²⁸ Allah declares, further, that if people genuinely repent and amend their conduct, they will receive His forgiveness for their sins and injustice.⁸²⁹ He also promises those who reform their lives and act righteously that they will be free from grief and fear.⁸³⁰ He further promises to change their life's circumstances for good (*tagyir*) if they recognise their wrongs, and make a genuine effort to reform their lives.⁸³¹

The Arabic term *islah* means to restore, repair or improve something that has been corrupted or broken.⁸³² Allah promised people who would reform their lives that he would improve their circumstances and bring restoration (*islah*), positive change (*tagyir*) and *tajdid* (renewal) to their lives.⁸³³ He declares that His desire is to bring back life to his people and to bring revival (*ehyah*) to the religion to resurrect people's lives like the rain brings new life to a dried-out land.⁸³⁴ The qur'anic call for reformation, thus, aims to see their individual lives as well as the society been restored.⁸³⁵

The Qur'an and the *Sunnah* repeatedly point out that due to the natural phenomenon of decay⁸³⁶ and since people have the tendency to go astray and that societies are being corrupted repeatedly, every new generation needs to be redirected to the right way and given a fresh message from God — appropriate for their own time and situation.⁸³⁷ This is why Allah kept sending prophet after prophet with new inspiration to renew the faith of the people and to bring new life to the religion and positive direction to the society.⁸³⁸ It is noteworthy that the Qur'an does not just speak about 'reminding' people of Allah's message, but rather about a 'new' inspiration. This can be understood to mean that the message of God needs to be adjusted to the situation in which every new generation finds itself. Bringing new inspiration does not mean to bring a new or different message. It rather reflects the aspect communicated in the Farewell Sermon, in which the Prophet urged Muslims to read and understand the Qur'an and the *Sunnah* for themselves, in the light of the core values of Islam and adjusted to

⁸²⁷ Surah 8:1; Surah 42:40.

⁸²⁸ Surah 16:97.

⁸²⁹ Surah 6:54; Surah 16:119.

⁸³⁰ Surah 7:35; Surah 6:48.

⁸³¹ Surah 13:11; Surah 21:105; Surah 7:170.

⁸³² Al-Asfahani op cit note 751 at 28.

⁸³³ Surah 4:114.

⁸³⁴ Surah 2:164.

⁸³⁵ Surah 39:53–54.

⁸³⁶ Salman al-Audah 'The Quran is a book of change' *Islam Today* 23 July 2011, available at <http://www.islamtoday.net/salman/artshow-28-153640.htm>, accessed on 24 August 2014.

⁸³⁷ Surah 4:163; Surah 16:43.

⁸³⁸ Surah 23:44.

their own time and environment.⁸³⁹ The Qur'an makes it very clear that Islam is not inflexible like a rock, but is rather like a living organism that reinvigorates itself on a regular basis through reformation.⁸⁴⁰ This is why *Shariah* is known to be flexible and fitting for all times and all circumstances.⁸⁴¹

The term *tajdid* (renewal) that is a crucial element of the concept of reformation means renewing what is corrupted and degenerated and thus returning it to its original condition.⁸⁴² It can be argued that the call to reformation includes the call to restore and renew the religion to its original condition. This includes and justifies efforts to clear Islamic law from any human interpretation of Islamic jurists that contradicts the Qur'an and its core values, or that might have been appropriate in earlier times, but that do not fit any longer with their reality of life of contemporary Muslims.

From all the above information about reformation in the Qur'an and the *Sunnah*, it can thus be seen that the core values delineated in the Quran are the protection of life and property, justice, forgiveness, mercy and reconciled relationships, which lead to peace and harmony. The promotion of these values logically leads to a rejection of the cruel, inhuman and degrading treatment of people. In other words, the explicit ban on cruel, inhuman and degrading punishments formulated by international human rights law can be seen as a logical consequence of the values promoted by the Qur'an and the *Sunnah*.

The aforementioned fact can be considered a strong argument and legal justification to reform *hudud* punishments. This is the more so, since several of the *hudud* ordinances that clash with international human rights laws have been developed by Islamic jurists without legal basis in the Qur'an. Some are even in contradiction to it. As previously mentioned, cleansing Islamic law of any human interpretation of Islamic jurists that contradicts the Qur'an can be seen as the fulfilment of the call to restore and renew the religion to its original condition.

In summary, it can be said that the Islamic call for reformation that aims to see the society restored and revived, acknowledges that every generation needs a fresh message from God that presents His eternal message adjusted to their time and life situation. The reality of the Muslim society in the twenty-first century is such that the protection of human rights can

⁸³⁹ Amina Wadud *Quran and Women: Rereading the Sacred Text from a Woman's Perspective* (1999) 94.

⁸⁴⁰ Mustafa Mahmoud *Al-Quran Kaen Hai* (1993) 4.

⁸⁴¹ Surah 2:173; Surah 2:286; Islamic scholars also use Surah 2:185 and Surah 4:28 to support the view that *shariah* is very flexible.

⁸⁴² Abdul Fatah defined *tajdid* as follows: 'Through the act of renewal (*tajdid*) old things (*qadeam*) are brought back into its original form and become new (*jadid*).' Abdul Fatah op cit note 754; Yusuf al-Qaradawi *Min Azhl Sahwa Ra'shida* (2001) 28.

be considered an internationally recognised standard, and that even most Muslim countries have become signatories of the main human rights documents. *Hudud* ordinances with their harsh and cruel punishments, however, clash significantly with internationally protected human rights and are therefore harshly criticised by the international community. Their enforcement brings harm to the Muslim society, since it violates human rights of individuals and causes Islam and Muslims to be criticised as being backward or barbaric.⁸⁴³

Since the qur'anic call for reformation is a call to restore and renew the religion to its original condition, it can be understood as a call to clear *hudud* ordinances from interpretations that have been developed by Islamic jurists, that contradict *Shariah* and its core values and that do not fit with the reality of life in the twenty-first century.

Efforts to clear Islamic law from prescriptions that cause harm to the Muslim society actually serve *Shariah*, since its main purpose is to serve the benefit of the people and to protect them from harm. This crucial aspect of the purpose and the flexibility of *Shariah* will be discussed further in the following section.

III *Shariah* and reformation

(a) The purposes of *Shariah* (*maqased al-Shariah*)

The Qur'an and the *Sunnah*, both of which discuss the concept of the purposes of *Shariah* (*maqased al-Shariah*), clearly point to the benefit of the people as the main purpose of *Shariah*. The Qur'an states : 'But teach (thy Message) for teaching benefits the Believers.'⁸⁴⁴ The definition given by Ahmed al-Raïssouni, and shared by most Muslim scholars and jurists says that *maqased al-Shariah* refers to 'the purposes designed by *Shariah* for the accomplishment of the benefit of the people'.⁸⁴⁵ Imam al-Amidi's definition further points out that serving the benefit of the people includes protecting them from harm: '*Maqased* brings to Muslims the beneficial or casts away from them what is harmful or both.'⁸⁴⁶ The call for preventing harm is not just a logical consequence of the call to protect the benefit of the people, but it is by itself an important Islamic principle. The Prophet Muhammad pronounced explicitly that 'harm must be removed'.⁸⁴⁷ Islamic scholars have, therefore, defined the

⁸⁴³ Wafa Sultan *A God Who Hates: The Courageous Woman who Inflamed the Muslim World Speaks out against the Evils of Islam* (2011) 155.

⁸⁴⁴ Surah 51:55.

⁸⁴⁵ Ahmad al-Raisuni *Nazariyat al-Maqased Aend al-Shatibi* (1995) 19.

⁸⁴⁶ Seif al-Din Ali al-Amidi *Al-Ahkam fi Usul al-Ahkam* 2 ed (1986) vol 3 at 296.

⁸⁴⁷ Al-Nawawi op cit note 122 at 87.

principle of *al-darar uzal* (harm must be removed) that protects the benefit of the people by allowing for the removal of any kind of harm to society or individuals.⁸⁴⁸

Knowing the purpose of *Shariah* helps one better understand the religious texts, and most importantly, it helps to interpret them correctly in a way to fit in with the realities of the time and the life situation of the people.⁸⁴⁹ This is essential, particularly for jurists whenever they have to develop new rulings. In order to deal with new cases and challenges that arise in a changing world in a way that meets the needs of changing circumstances, they should not depend on the religious texts alone, but they should apply the spirit of *Shariah* while having the main purpose of *Shariah* in mind.⁸⁵⁰

In order to protect the benefit of the people, *Shariah* provides two powerful principles that allow for exceptions, thereby permitting what is generally prohibited if the circumstances require doing so to protect the benefit of the people. These two principles are known as the jurisprudence of necessity (*fiqh al-darurah*) and the jurisprudence of reality (*fiqh al-waqa*).

i. The jurisprudence of necessity (*fiqh al-darurah*)

The jurisprudence of necessity (*fiqh al-darurah*) allows for exceptions from what is otherwise prohibited if there is a necessity to do so for the sake of protecting the benefit of the people.⁸⁵¹ This principle is known as *al-darurat tubih al-mahzurat*: ‘The necessities make the prohibited permissible.’⁸⁵² If, for example, a prohibited action is used to save a person’s life, it becomes permissible.⁸⁵³ Surah 16:115 states: ‘[I]f one is forced by necessity, without wilful disobedience, nor transgressing due limits, then Allah is Oft-Forgiving, Most Merciful.’⁸⁵⁴ The principle of necessity, for example, will allow Muslims on the point of death from starvation to eat a dead animal, something which is clearly prohibited in the Qur’an.⁸⁵⁵ An example of the application of this principle can be seen in a *hadith* that speaks about a man and his wife whose camel had died of a sickness, and when they asked the Prophet, he

⁸⁴⁸ Hasan al-Feki 'Al-magma al-muzahab fi qawaed al-mazhab' (unpublished MA thesis, al-Jameah al-Islamiya, Medina, 1993) vol 1 at 371–2.

⁸⁴⁹ Abdul Rahman Bin Ali Ismail 'Maqassad al-Shariah' *Islamtoday.net* 4 December 2010, available at <http://www.islamtoday.net/bohooth/artshow-86-142687.htm>, accessed on 8 November 2015.

⁸⁵⁰ Omr Ebeid Hasana *Maqalat fi al-Tafkir al-Maqasedi* (1999) 20.

[illegible]

⁸⁵² Badr Eddin al-Zarkashi *Al-Manthur fi al-Qawaed* (2000) vol 2 at 386.

853 Ibid.

⁸⁵⁴ Surah 6:119. See also Surah 2:173; Surah 5:3.

855 Ibid.

allowed them to eat the camel's meat, since they had nothing else to eat. He thereby made the prohibited permissible on the grounds of necessity.⁸⁵⁶

The Muslim scholars developed many detailed definitions, as to what can be considered to constitute a necessity (*darurah*). They distinguish three categories: *daruriat* (necessities), *hajiāt* (needs) and *tahsinat* (preferences).⁸⁵⁷ They defined, for example, that 'a need can be treated as necessity' (*al-haja tanzil manzilat al-darurah*),⁸⁵⁸ if there is no other way to eliminate situations or circumstances that threaten or harm the benefit of the people (*masaleh al-nas*) by making it difficult for them to live their lives and practice their faith. An example of this principle articulated in the *Sunnah* is found in a *hadith* that speaks about the Prophet's using a silver cup, even though he previously had prohibited Muslims from drinking out of a golden or silver cup. Muslim scholars use this *hadith* as an example of how the Prophet treated the need (for a cup) as a necessity. Here again, due to the necessity the prohibited was made permissible.⁸⁵⁹

The Qur'an speaks about the principle of necessity also in connection with religious duties. In Surah 2:185 the Qur'an stresses that all Muslims should fast during the month of Ramadan. In the same breath, however, the Qur'an allows for exceptions if this is necessary due to travelling or because of sickness.⁸⁶⁰

The Qur'an points out explicitly that Allah aims to make it easy for people to keep the religious duties.⁸⁶¹ Also in respect of the washing ritual in preparation for prayer, Allah wants to make it easy for people to fulfil their religious duty, thus in instances when no water is available for this ritual, clean sand or dust can be used in its place (*tayammum*).⁸⁶²

These examples demonstrate the flexibility of *Shariah* and how the principle of necessity can be applied to fulfil its purposes by protecting the benefit of the people and making it easy for them to fulfil their religious duties.⁸⁶³

⁸⁵⁶ Al-Azim al-Abadi *Awn al-Maabud Sharh Sunan Abu Dawud* (1995) vol 10 at 47 and vol 2 at 724.

⁸⁵⁷ Al-Shatibi *Al-Muafaqat* (1997) vol 2 at 8–11; Abi Hamed al-Ghazali *Al-Mustasfa min Elm al-Usul* (1993) vol 2 at 481.

⁸⁵⁸ Ahmad al-Zarqa *Sharh al-Qawaed al-Fiqhiyya* 2 ed (1989) 155.

⁸⁵⁹ Al-Asqalani op cit note 759 at vol 10 at 101 & 104.

⁸⁶⁰ Surah 2:185 'Ramadhan is the (month) in which was sent down the Qur'an, as a guide to mankind, also clear (Signs) for guidance and judgment (Between right and wrong). So every one of you who is present (at his home) during that month should spend it in fasting, but if anyone is ill, or on a journey, the prescribed period (Should be made up) by days later. Allah intends every facility for you; He does not want to put to difficulties. (He wants you) to complete the prescribed period, and to glorify Him in that He has guided you; and perchance ye shall be grateful.'

⁸⁶¹ Surah 22:78.

⁸⁶² Surah 4:43 and Surah 5:6; *Sahih al-Bukhari* (1997) vol 1 at 235–6 *hadith* 348.

⁸⁶³ Ibn al-Qayyim al-Jawziyyah op cit note 36 vol 3 at 12.

ii. The jurisprudence of reality (*fiqh al-waqa*)

The jurisprudence of reality is another important principle designed to secure the benefit of the people. It calls on jurists to consider the reality of the environment and life circumstances of the people whenever a new legal provision is developed, to make sure that the new ruling will be appropriate and fitting for its time and environment.⁸⁶⁴ The principle of reality can also be applied to make exceptions from existing rulings if the realities of life and circumstances require it. One of the famous examples that demonstrate this is the historical account of the second caliph, Umar Ibn al-Khattab, who during a year of famine placed a moratorium on the punishment of amputation of the hand meted out for theft.⁸⁶⁵ This example shows the great flexibility that the jurisprudence of reality can provide. It is a powerful tool used to fulfil the purpose of *Shariah* by protecting the benefit of the people.

The clearest example of the application of the principle of reality can be seen in the life of the Prophet Muhammad. The differences between the legal provisions that were drawn up during his time in Mecca, and that in Medina give a clear picture of how both the Prophet and Allah Himself adjusted their teaching to meet the realities of the life of the Muslim community.⁸⁶⁶ Following the Prophet's flight from Mecca to Medina (the *hijra*), the situation of the Muslim community changed significantly, as did the legal provisions.

There are other examples of how Allah himself considered the reality of the life of the people.⁸⁶⁷ One of them is concerning the prohibition of alcohol. During the time of the Prophet alcohol consumption was very high. Allah, therefore, did not prohibit it instantly, since it would have been hard for the people to stop drinking any alcohol instantly, from one day to the next. Instead, Allah approached the issue gradually. Allah considered the reality of the people's life and decided to make it easy for them. No indication is given as to alcohol's permissibility the first time alcohol is mentioned in the Qur'an.⁸⁶⁸ It is referred to as a type of food only, and the verse mentions that it can be processed to produce a kind of liquor. This verse dates back to the Prophet's time in Mecca. When in Medina he was asked about the use of wine and gambling His response was that Allah has declared drinking to be a sin, although

⁸⁶⁴ Maher Hussein Hashwah *Fiqh al-Waqeh wa Atharoh fi al-Ijtihad* (2006) 107.

⁸⁶⁵ Ibid; Ibn al-Qayyim al-Jawziyyah op cit note 36 vol 3 at 12.

⁸⁶⁶ Abdullah Mohammed al-Jabouri *Al-Aqaliyat al-Muslima wa Tagyir al-Fatwa*, 29, Gameat Al-Shariqa, Shariqa, UAE, available at <http://www.world-dialogue.org/MWL/fatwa/FCS4R3.pdf>, accessed on 8 November 2015.

⁸⁶⁷ Ismail al-Jervi 'Al-ejaz al-tashrie fi tahream al-khamer' *Gameat al-Eman* Sana'a, 27 January 2013, available at http://www.jameataleman.org/main/articles.aspx?article_no=1768, accessed on 8 November 2015.

⁸⁶⁸ Surah 16:67 'And from the fruit of the date-palm and the vine, ye get out wholesome drink and food: behold, in this also is a sign for those who are wise.'

it was not prohibited at that time.⁸⁶⁹ Later Allah limited the use of alcohol declaring that Muslims should not approach their prayers ‘with a mind befogged’, but even then drinking alcohol was not completely prohibited.⁸⁷⁰ Eventually Allah prohibited gambling and the consumption of intoxicants declaring that both are an abomination of Satan's handwork, used by Satan to excite enmity and hatred between people, and to keep them from the remembrance of Allah and from prayer. The two relevant qur'anic verses were revealed during the Prophet's time in Medina.⁸⁷¹ This example of how the prohibition of alcohol was introduced gradually demonstrates the flexibility of *Shariah* and the extent to which Allah considered the realities faced by the people.

Another example of the practical application of the principle of reality can be seen in the *Sunnah*, in a *hadith* narrated by Abu Hurairah. This is about a man who came to the Prophet confessing that he had sinned by having sexual intercourse with his wife during a fasting season. In the search for an appropriate punishment for this sin, the Prophet suggested that the man should release a slave as a penalty for his sin, or feed sixty people, but the man did not own a slave, nor could he afford to feed anyone. Finally, the Prophet offered the man a large basket of dates, instructing him to feed anyone poorer than he was. When the man declared that he was the poorest in his area, the Prophet instructed him to take the dates to his own family.⁸⁷² This example shows how the Prophet considered the reality of the life circumstances of the man who had sinned, even to the extent that what was meant as a punishment eventually turned out be a blessing for the man.

Imam al-Shafei — founder of the Shafei School of jurisprudence — also applied the principle of reality extensively in his life, adapting the teachings of Islam to the realities found in different places and different customs.⁸⁷³ Some of the provisions that he had previously developed during his time in Baghdad were later adapted while he was in Egypt, due to its different environment, people and customs.⁸⁷⁴

The Prophet's second successor, Umar Ibn al-Khattab, practiced the principle of reality when he revoked the tradition of paying financial support to ‘those whose hearts have been

⁸⁶⁹ Surah 2:219 ‘They ask thee concerning wine and gambling. Say: "In them is great sin, and some profit, for men; but the sin is greater than the profit." They ask thee how much they are to spend; Say: "What is beyond your needs." Thus doth Allah Make clear to you His Signs: In order that ye may consider.’

⁸⁷⁰ Surah 4:43 ‘O ye who believe! Approach not prayers with a mind befogged ...’

⁸⁷¹ Surah 5:90 ‘O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination, — of Satan's handwork: eschew such (abomination), that ye may prosper.’
 Surah 5:91 ‘Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye not then abstain?’

⁸⁷² *Sahih al-Bukhari* (1997) vol 3 at 100 & 101 *hadith* 936.

⁸⁷³ Ibn Abi Hatem *Manaqeb al-Shafei* (2003) 60.

⁸⁷⁴ *Ibid*; Ali Ibn Musa al-Baihaqi *Manaqeb al-Shafei* (1970) vol 1 at 263.

(recently) reconciled (to Truth),⁸⁷⁵ (*sahm al-mualafa qulubahum*),⁸⁷⁶ a tradition started by the Prophet and continued by his first successor, Abu Bakr. Al-Khattab stopped these payments since the Islamic state was already established and therefore he saw no more need for them.⁸⁷⁷ He felt that there were more urgent needs for which the money could be used.⁸⁷⁸ It is noteworthy that this tradition was based on an explicit order of Allah: ‘([T]hus is it) ordained by Allah ...’. This example demonstrates that the principle of reality can be applied, even in respect of explicit orders of Allah if this is necessary to secure the benefit of the people.

These examples of the principles of reality and necessity demonstrate that *Shariah* gives jurists great liberty to amend legal provisions, if this is necessary to adjust to the realities of life of the people and to secure the purpose of *Shariah*, namely the benefit of the people; this includes taking any unnecessary burden from them. It can be argued, therefore, that these two principles can be applied to amend the harsh and cruel *hudud* punishments, since they do not fit with the reality of life of the Muslim community in the twenty-first century. They even cause harm to the reputation of the Muslim community.

It is noteworthy here that the aforementioned examples have demonstrated that in times of necessity Allah allows for exceptions concerning the fasting or the washing, thus making compromises in respect of the religious duties, which are considered to concern the rights of Allah. The notion of the right of Allah is one of two main obstacles to reformation; the other is the notion of the protection of religion. Both of these will be discussed in the following section.

(b) Two major obstacles for reformation

i. The protection of the religion

In contradiction to the main purpose of *Shariah*, namely to serve the benefit of the people and to protect them from harm, orthodox Islamic scholars view the protection of the religion as one of the main purposes of *Shariah*. They have declared that the main purpose of *Shariah* is the protection of the five indispensables, namely religion, life, intellect, offspring and

⁸⁷⁵ Surah 9:60 ‘Alms are for the poor and the needy, and ... for those whose hearts have been (recently) reconciled (to Truth)... (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom.’ The Arabic text of this part of the verse is less specific than Yusuf Ali’s translation. It speaks about a payment for the purpose ‘to bring the hearts together’ or ‘a share for people to soften their hearts’ which is usually understood to refer to the purpose of helping and encouraging new believers in their new faith.

⁸⁷⁶ Hashwah op cit 864 at 54–5.

⁸⁷⁷ Ibid.

⁸⁷⁸ Muhammad Beltaji *Manhaj Umar Ibn al-Khattabfi al-Tashreeh: Derassah Mustawaba le Fiqh Umar wa Tanzematah* (1970) 180–1.

money.⁸⁷⁹ Al-Ghazali explains that ‘everything that protects these five indispensables is called *maqased* and everything that works against these five is called *mafased* [harm or corruption]’.⁸⁸⁰ The problem with this concept is that orthodox jurists have given the protection of the religion priority over the protection of the other four indispensables that refer to individuals’ rights.⁸⁸¹ The protection of life, intellect, offspring and money serves the benefit of the people, works to protect them from harm,⁸⁸² and is in line with the Islamic core values and with internationally protected human rights.⁸⁸³ The protection of religion, by contrast, contravenes the benefit of the people, since it can lead to harm to an individual in instances when one’s behaviour is considered violating the religion, as, for example, in the case of apostasy.⁸⁸⁴

It is for the purpose of protecting the religion that Islamic scholars have, for example, prescribed an earthly punishment for apostasy, and that they have broadened the definition of the crime of *haraba* to include not only physical attacks against Islam or the Muslim community, but also anything that can be considered an insult to Allah or His Messenger and anything that might cause Muslims to leave Islam.⁸⁸⁵ Giving protection of religion priority over protection of the other four indispensables clearly contradicts the teaching of the Qur’an, for Allah makes it clear in the Qur’an that He Himself guards and defends the religion and that He is capable of doing so alone. He never requested Muslims to help Him to protect the religion. In Surah 15:16, He states that He has sent the religion, including the signs in the heavens, and that He will guard the religion. Similarly, in Surah 15:9 Allah states clearly that He is the one who revealed the Qur’an and that He will guard and defend it. In Surah 21:9 He promises to defend His people and to destroy their enemies, and in Surah 21:18 He declares that He will defend the truth against falsehood. In Surah 58:21 Allah proclaims that He and His Messengers will always be victorious: in other words, He is able to defend His religion and He does not need help from anyone else.⁸⁸⁶

For Islamic scholars to assign an earthly punishment for what they consider violations of the religion, clearly contradicts *Shariah*, for Allah makes it clear that whether a person

⁸⁷⁹ Abi Hamed al-Ghazali *Al-Mustasfa min Elm al-Usul* (1997) vol 1 at 417.

⁸⁸⁰ Ibid.

⁸⁸¹ Abdulaziz Abdullah al-Namlah *Guhud Hieat al-Amer bel Maruf wal Nahi an al-Munkar fi Hefz al-Darurat al-Khames* (2010) 12.

⁸⁸² Ismail op cit note 849.

⁸⁸³ Mohamed Emara *Al-Islam wa Huquq al-Inssan* (1990) 52.

⁸⁸⁴ Al-Namlah op cit note 881 at 16.

⁸⁸⁵ Ibid.

⁸⁸⁶ Surah 15:9 ‘We have, without doubt, sent down the Message; and We will assuredly guard it (from corruption).’

worships Him alone or rejects the faith is an issue between that person and Him, and the consequences or reward will be in the afterlife. This can be seen in different holy texts, for example, in one *hadith* the Prophet explains: ‘Whoever dies not associating anything with Allah will enter Paradise, and whoever dies associating anything with Allah will enter the Fire.’⁸⁸⁷ Another one declares that: ‘No one in whose heart is faith the weight of a mustard-seed will enter the Fire, and no one in whose heart is arrogance the weight of a mustard-seed will enter Paradise’⁸⁸⁸

Even though the Qur'an and the *Sunnah* make it clear that faith in Allah is crucial and decisive in terms of whether a person will enter paradise, Allah did not force people to follow Him.⁸⁸⁹ He points out in Surah 2:256 that there is no compulsion in religion⁸⁹⁰ and that it is not possible to force anyone to believe. This is iterated in Surah 18:20, where He declares: ‘Let him who will believe, and let him who will, reject (it).’ The protection of the religion, which is listed as one of the five indispensables, should therefore actually be read as the protection of the freedom of religion.

Ergo, human efforts to protect the religion, including trying to force people to follow Islam and prescribing earthly punishments for religious violations, clearly contradict Allah’s teachings. From all the above texts, it can be seen that there is no justification for the scholars to elevate the protection of the religion above the protection of the other four indispensables or above the protection of the benefit of the people. Those *hudud* punishments that have been developed as a human effort to protect religion and that have no legal justification in the Qur'an, particularly the death penalty for apostasy, should therefore be eliminated to reform and clear Islamic law by bringing it into compliance with *Shariah* and its main purpose to benefit the people.

A second major obstacle that hinders efforts to reform *hudud* ordinances is the argument that they cannot be forgiven or amended since they concern the right of Allah. This notion is further discussed in the following section.

⁸⁸⁷ *Sahih Muslim* English translation (2007) vol 1 at 180 *hadith* 269.

⁸⁸⁸ *Ibid* at 179–80 *hadith* 266.

⁸⁸⁹ Surah 10:99 ‘If it had been thy Lord's will, they would all have believed, - all who are on earth! wilt thou then compel mankind, against their will, to believe!’

⁸⁹⁰ Surah 2:256 ‘Let there be no COMPULSION IN religion: Truth stands out clear from Error: whoever rejects evil and believes IN Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things.’

ii. The right of Allah

The notion of the right of Allah is one of the main arguments used by Islamic jurists to oppose any attempt to question or amend *hudud* ordinances. Islamic jurists claim that the right of Allah makes it impossible to amend rulings, or to compromise or forgive punishments that are considered to concern the right of Allah.⁸⁹¹ They argue that the *hudud* ordinances concern the right of Allah, and that therefore only Allah can forgive or change them.⁸⁹² It is for this reason, that the right of Allah is often considered to be one of the main obstacles preventing Islamic jurists from amending the *hudud* ordinances.

It is important to note that the notion of the right of Allah and its implications are a humanly developed concept, established by Islamic jurisprudence. The notion cannot be found in the primary sources of *Shariah*.

Different views exist as to what is the definition of what exactly can be considered to concern the right of Allah. The majority of scholars contrast the right of Allah with ‘the right of man’.⁸⁹³ According to these jurists’ definition, *hadd* crimes concerning the right of Allah cannot be questioned, forgiven or dropped, whilst *hadd* crimes against the right of man, such as the crime of *qazf*, can be forgiven by the victim or its family.⁸⁹⁴ The crime of *qazf* is actually considered to refer to both the right of man and the right of Allah. It is thus believed that the offence against the victim can be forgiven, while the offence against Allah still has to be punished.⁸⁹⁵

Some scholars, however, support a very wide definition and declare that everything concerning Islam can be considered to be the rights of Allah.⁸⁹⁶ The explanation given by the famous Islamic jurist, Imam al-Qaraafi, includes both these definitions when he states that ‘Islam is a right that belongs to Allah...’ and ‘the Islamic rituals are the right of Allah’.⁸⁹⁷ He concludes that ‘as this belongs to Allah, this can be forgiven only by Allah’.⁸⁹⁸

In their definition of the right of Allah, Islamic scholars usually distinguish between two categories of rules and regulations, namely, the first category that deals with the right of Allah

⁸⁹¹ Youssef al-Shubily ‘Fiqh al-hudud’, 2, *Shubily.com*, available at <http://www.shubily.com/index.php?news=92>, accessed on 9 November 2015.

⁸⁹² Ahmed Bin Abdel Halim Bin Abdul Salam Ibn Taymiyyah *Al-Siasa al-Sharaiyah fi Islah al-Raey wal-Raiyah* (1997) 125.

⁸⁹³ Ibn al-Qayyim al-Jawziyyah op cit note 36 at 108.

⁸⁹⁴ Audah op cit note 252 at vol 1 at 618.

⁸⁹⁵ Al-Quraafi op cit note 118 vol 1 at 140–142.

⁸⁹⁶ Ibid at vol 3 at 184–5.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid.

to be worshipped and all the religious duties; and the second category, which deals with the public interest.⁸⁹⁹

This category deals with issues concerning the relationship of people with others, such as the prohibition of stealing, killing and defamation.

Logically, it is hard to understand why the category of the public interest should be declared to concern the right of Allah, particularly since this argument is used to hinder amendments of *hudud* ordinances that would serve the benefit of the people. The fact that even issues that concern the public interest are considered to concern the right of Allah actually implies that the public interest is very important to Allah. The argument that the public interest is important to Allah is actually a confirmation of the fact that the benefit of the people is the main purpose of *Shariah*.

The claim that punishments for violations of the public interest or safety cannot be forgiven, since they concern the right of Allah, is thus not logical. This is particularly so when considering that the benefit of the people is the main purpose of *Shariah* and when taking into account that Allah loves to forgive and hates to enforce *hudud* punishments. That Allah hates to punish people is demonstrated clearly in a *hadith* in which the Prophet advises ‘Avoid *hudud* from Muslims as much as you can and if there is any way to exit, let the Muslim go and don’t punish him. And if the Imam mistakenly forgives is much better than mistakenly punish.’⁹⁰⁰ According to another *hadith*, the Prophet says about the sins of adultery, theft and drinking alcohol that if the person who has committed such a sin repents afterwards, he/she will be forgiven.⁹⁰¹

The claim that violations of *hudud* crimes cannot be forgiven since they concern the right of Allah can further be refuted by the following argument in the Qu’ran, since Surah 5:90 declares that drinking and gambling are an abomination to Allah. According to this verse, there is no justification to treat drinking any differently from gambling, or to treat drinking as an unforgivable *hadd* crime, whilst gambling is not listed as a *hadd* crime.

Furthermore, it is important to note that those crimes that have been listed as *hudud* crimes are not described as such in the Qur'an. The notion of an allegedly fixed set of *hudud* crimes has little evidence to support it — it is not mentioned in the primary sources of *Shariah* and it actually even contradicts the Qur'an, as demonstrated in the example of

⁸⁹⁹ Al-Shatibi op cit note 98 at vol 2 at 318–320.

⁹⁰⁰ ‘Aishah narrated that the Messenger of Allah said: "Avert the legal penalties from the Muslims as much as possible, if he has a way out then leave him to his way, for if the *Imam* makes a mistake in forgiving it would be better than making a mistake in punishment."’ *Sunan at-Tirmidhi* (2007) vol 3 at 208 no 1424. Muhammad Abdulrahman al-Mubarakfuri *Tuhfat al-Ahuzi Sharh Sunan at-Tirmidhi* (1984) vol 4 at 580, 688.

⁹⁰¹ *Sahih Muslim* English translation (2007) vol 1 at 155 *hadith* 208.

drinking and gambling. It also contradicts the list of crimes described as the seven worst sins in the *Sunnah*.⁹⁰²

In addition, even if there were some validity in the argument that *hudud* ordinances cannot be amended since they concern the right of Allah, it would apply only to those punishments that have indeed been prescribed by Allah Himself, thus, those assigned in the Qur'an.⁹⁰³ It would not apply to those that have been added and developed by Islamic jurists based on the *Sunnah*. Secondly, if the argument were correct, the right of Allah would have been severely violated when Umar Ibn al-Khattab placed the moratorium on the punishment of theft, a punishment explicitly prescribed in the Qur'an.⁹⁰⁴ Interestingly, al-Khattab's moratorium has never been criticised by Islamic scholars. Quite the contrary, it is usually used as example to demonstrate the great wisdom of al-Khattab.⁹⁰⁵ This can be considered clear proof that the right of Allah does not interfere with the application of the principle of necessity or reality. It also proves that it is possible to put a moratorium on *hudud* punishments, if the reality of life requires it for the benefit of the people. The protection of what is supposed to concern the right of Allah does not diminish the protection of the benefit of the people.

Opponents of this view might argue that al-Khattab did not violate the right of Allah, since the crime of theft concerns the right of man, its punishment aiming at protecting people's property. A denial that the punishment for theft concerns the right of Allah entirely refutes the claim that *hudud* ordinances are a fixed set of crimes that concerns the right of Allah.

In summary, it can be said that the argument that *hudud* ordinances cannot be amended since they concern Allah's right, has been refuted on various grounds.

Those Islamic jurists, who believe that the right of Allah makes it impossible to make any amendments or to forgive violations of the rights of Allah, usually view *Shariah* as being firm like a rock, stiff and unchangeable. Al-Qarafi, on the contrary, believes that it is the weaknesses and rigorousness of the human heart that leads people to view the *Shariah* prescriptions as stiff and unchangeable like a rock. In his explanation of the right of Allah, Al

⁹⁰² The seven 'worst sins' listed in the *hadith* are: 'Associating others with Allah (*Shirk*); witchcraft; killing a soul whom Allah has forbidden us to kill, except for a right that is due; consuming orphans' wealth; consuming *Ribā* [taking interest]; fleeing from the battlefield; and slandering chaste, innocent women.' *Sahih Muslim* (2007) vol 1 at 177 *hadith* 262.

⁹⁰³ Namely adultery, theft, *haraba* and *qazf*.

⁹⁰⁴ Surah 5:38 'As to the thief, Male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power.'

Raed Nasri Jamil Abu Muanes *Manhag al-Talil bel Hekmah wa Atharuhu fi al-Tashre al-Islami* (2007) 481.

⁹⁰⁵ Ibid.

Qaraafi points to the hardness of the human heart. ‘Men are greedy and weak’, he declares, ‘this is why they are sticking to hold on to their rights and cannot easily forgive’. He points out that Allah, by contrast, ‘is generous and His mercy equals His gift of forgiveness’.⁹⁰⁶ Al-Qaraafi seems to imply that the problem lies not with *Shariah* or with Allah — since He is generous and full of mercy and forgiveness —or with prescriptions concerning Allah’s right, but rather with the human heart. *Shariah* communicates clearly that the right of Allah is based on His forgiveness, for he loves to forgive and to show mercy, hates to punish and wants to make it easy for people. This is seen in both the Qur'an and the *Sunnah*. Imam Ibn al-Qayyim explains that: ‘*Shariah* is based on the interests of the people, in life and after life, it is all just and mercy.’⁹⁰⁷

Allah’s desire is to make things easy for people. This can be seen, for example, in the following *hadith* narrated by Abu Hurairah that quotes the Prophet thus:

‘When one of you leads the people in prayer, let him make it brief, for among them are the young and the elderly, the weak and the sick. And when one of you offers prayers alone, let him pray as he likes.’⁹⁰⁸

In other words, prayer leaders are called to show mercy and to make it easy for the people to perform their duty of prayer.

Evidence of Allah’s forgiveness can be found in different places in the *Sunnah*. When a Muslim does the *hajj*, for example, all his previous sins and crimes will be forgiven.⁹⁰⁹ This is the case, too, when someone converts to Islam.⁹¹⁰ Even if he has committed adultery before his conversion, the *hadd* punishment will be forgiven.⁹¹¹ Evidence that even *hadd* crimes can be forgiven, can be seen also in the Qur'an. Surah 25:68–71, for example, states that if a person repents and amends his or her conduct Allah forgives even the crimes of killing, adultery and worshipping gods other than Allah.⁹¹² Forgiveness of *hadd* crimes is also mentioned in a *hadith* that points out that faith in Allah is the key criterion that decides

⁹⁰⁶ Al-Quraafi op cit note 118 at vol 3 at 184–5.

⁹⁰⁷ Said Ibn al-Qayyim *I’lam al-Muwaqean* (2015) vol 3 at 14–15.

⁹⁰⁸ *Sahih Muslim* English translation (2007) vol 1 at 578 *hadith* 1046.

⁹⁰⁹ Yahya Ibn Sharaf al-Nawawi *Al-Minhag Sharh Sahih Muslim* (1972) vol 2 at 136–9.

⁹¹⁰ Ahmad Ibn Hanbal *Al-Musnad* (2008) vol 4 at 199, 204, 205; Muhammad Nasir ad-Din al-Albani *Erwa al-Ghalil* (1985) vol 5 at 121; Jalaluddin al-Siuti *Al-Ashba wal Nazaer fi Qawaed wa Forua al-Fiqh al-Shafei* (1983) 223; Al-Nawawi op cit 909.

⁹¹¹ *Tafsir al-Qurtubi* (1964) vol 7 at 402–3; Saad Ibn Muhammad al-Kubi *Hashiyah ala al-Qaul al-Mukhtar fi Shareh Ghayat al-Ekhtesar li-Abi Shuja Muhammad Bin Qasim al-Ghuzi* (2011) vol 4 at 4, 17; Muhammad Ibn Abdulah al-Khershah *Sharh Mukhtasar Khalil* 2 ed (1899) vol 8 at 82 ; Abdulah Ibn Ahmad Ibn Qudamah *Al-Mughni* (1985) vol 12 at 297.

⁹¹² Surah 25:68–70; Surah 25:70; Surah 25:71.

Bader al-Din al-Aini *Al-Binayah fi Sharh al-Hidayah* (2000) vol 1 at 137–8; Muhammad Ibn Ahmad Ibn Juzay *Al-Qawanin al-Fiqhiya* (2009) 100; Abi Ishaq al-Sherazi *Al-Muhazab fi Fiqh al-Imam al-Shafei* (1992) vol 1 at 177 ; Ibn Qudamah op cit note 911 at vol 4 at 141.

whether a person will enter paradise. Even if a person has committed adultery or theft, Allah can forgive these sins and will still let the person enter paradise.⁹¹³

The same merciful attitude is reflected in the aforementioned *hadith*, according to which even the sins of adultery, theft and drinking can be forgiven if the offender repents afterwards;⁹¹⁴ and in the *hadith* that calls to avoid *hudud* punishment as much as possible, since forgiving mistakenly is much better than mistakenly punish.⁹¹⁵ Allah also declared: ‘My Mercy overpowers My Anger.’⁹¹⁶

It can be seen from these examples that Allah loves to forgive. He can even forgive *hadd* crimes. He loves to show His mercy and hates to punish people. His heart’s desire is to make it easy for people. This is what Islamic jurists should keep in mind when they deal with *hudud* ordinances. If they do not wish to violate Allah’s right, they should rather oppose and adjust the prescriptions pertinent to *hadd* crimes that have been developed and added by Islamic jurists, for these make life difficult for people and thus violate the purposes of *Shariah*. Since Allah’s desire is to make it easy for people and to protect life, prescribing punishments that have not been prescribed by Allah Himself can actually be considered as a violation of Allah’s right and a violation of the purposes of *Shariah*.

As has been seen in the above section, it is especially the prescriptions concerning apostasy and *haraba* whose aim is to protect the religion that have no justification. There is also no justification for Islamic jurists’ reluctance to apply the principles of reality and necessity when it comes to the right of Allah. As mentioned earlier, *hudud* ordinances damage the reputation of Muslim society in the eyes of the world. The principles of necessity and reality, which are designed to protect the purposes of *Shariah*, should be practiced by Islamic jurists to bring *hudud* ordinances into line with the realities of the life of Muslim society in the twenty-first century. This includes an international call for Muslims to abide by international human rights standards. Any amendment of the *hudud* ordinances that will result in their compliance with international human rights laws will also be very beneficial for leaders of Muslim countries who seek good international relations, since it will prevent them from the temptation of violating, ignoring or rejecting *Shariah*. In summary, it can be said that this chapter has demonstrated that amending *hudud* ordinances by applying the principles of necessity and reality is not only acceptable from the perspective of *Shariah*, but it can be even considered necessity to secure the benefit of the Muslim society in this century.

⁹¹³ *Sahih Muslim* English translation (2007) vol 1 at 181 *hadith* 271.

⁹¹⁴ *Ibid* at 155 *hadith* 208.

⁹¹⁵ Al-Mubarakfuri op cit note 900.

⁹¹⁶ *Sahih al-Bukhari* bk 59 *hadith* 5.

IV Conclusion

This chapter has demonstrated that reformation is an Islamic concept deeply rooted in the Qur'an and the *Sunnah*. It is thus not a human invention, nor a modern idea, much less a sign of a lack of loyalty to Islam. The Islamic call for reformation refers to a call to return to the religion and for renewal of the faith. It aims to see the society restored and revived.

The Qur'an can be considered a book of reformation in its entirety, since it speaks about all the prophets and messengers whom God sent to his people to call them to reform their lives. The Qur'an and the *Sunnah* explain that people have the tendency to leave the godly ways of justice and to go astray, following selfish and destructive desires, which cause the decline of a society. The Qur'an declares that this is why people of every generation need fresh inspiration to renew and revive their faith — a fresh message of reformation, to present the eternal core values of the Qur'an and the *Sunnah* in a way adapted to the life situation and circumstances of their own time. This call for reformation does not aim to change *Shariah*, but rather to encourage Muslims to change and improve their lives, and to bring them into compliance with *Shariah*. The call for reformation is, thus, a call for them to turn away from evil ways, to renew their faith and to act according to the core values presented in the Qur'an and the *Sunnah*, namely, doing good to others, giving charity, acting justly and fairly, caring for orphans and restoring relationships through reconciliation and forgiveness, which leads to peace and harmony.

The aspect of renewal (*tajdid*) of what has been corrupted and degenerated and to restore it to its original condition is an important element of the concept of reformation as presented in the Qur'an. It can thus be argued that the qur'anic call for reformation includes the call to restore and renew the religion to its original condition, which includes and justifies efforts to clear Islamic law from any human interpretation of Islamic jurists that contradicts the Qur'an or its core values and that fits no longer with the reality of life of contemporary Muslims.

The same aspect can be seen in the famous Farewell Sermon of the Prophet, which is one of the key texts concerning reformation in the *Sunnah*. In it the Prophet points out several core values of Islam and stresses that the Qur'an and the *Sunnah* are given to Muslims as the ultimate guideline. In doing so he points out that Muslims of the future (that of the present), might understand them even better than the Muslims of his own time. According to this important statement, contemporary Muslims have the right and the ability to examine for themselves the message of the primary sources in order to determine how to best apply it in their own time. It is thus their responsibility not to follow blindly the interpretations of early

Islamic scholars and jurists, but to do *ijtihad* and to examine and filter the rulings of Islamic law in the light of the primary sources of *Shariah* and its core values and, if necessary, to re-interpret them.

The Islamic core values delineated in the Qur'an and *Sunnah* include the protection of life, protection of property, justice and fairness without discrimination, a spirit of brotherhood, an appreciation of women and their rights, mercy, forgiveness, reconciliation, peace and harmony. The promotion of these values logically leads to a rejection of a cruel, inhuman and degrading treatment of people. The explicit ban on cruel, inhuman and degrading punishments formulated by international human rights law can thus be seen as the logical consequence of the values promoted by the Qur'an and the *Sunnah*. This can be considered a strong argument and legal justification to reform *hudud* ordinances.

As previously mentioned, the Islamic call for reformation aims to see the society restored and revived. The benefit of the people is, in fact, the declared primary purpose of *Shariah*. The Qur'an and the *Sunnah* explain that the main purpose of *Shariah* is to serve the benefit of the people and to protect them from harm. The Prophet explicitly pronounced that 'harm must be removed'.

With the principles of reality and necessity, *Shariah* provided the necessary tools to protect these purposes. This is why *Shariah* is known to be flexible enough to suit all times and every environment.

Hudud ordinances, as developed by Islamic jurisprudence, are a major source of harm for the society. Due to their extremely harsh and cruel punishments that clash with internationally protected human rights they are harshly criticised by the international community and cause Islam and Muslims to be labelled 'backward' or 'barbaric'.

This kind of damage to the image and reputation of Islam and Muslim society could — and should — be prevented, the more so since the harshest punishments for *hudud* crimes, including the death penalty for apostasy, are not even prescribed by *Shariah*, but derive from prescriptions developed by Islamic jurists. There is enough legal justification to amend them, especially since Allah repeatedly calls on Muslims to protect life, and further states clearly that only He has the right to give or take life.

With the help of the principles of reality and necessity it will be possible for Islamic jurists to fix the image of the Muslim community by amending *hudud* ordinances in a way to reconcile them with international human rights standards.

It is due to two major misconceptions that most Islamic jurists do not even dare to think of amending *hudud* ordinances. The first one of them is the belief that *hudud* ordinances

cannot be amended because they concern the right of Allah and therefore only Allah Himself can forgive or change them. Regardless of the fact that this claim can be refuted on several grounds, this chapter has demonstrated that even if it were valid, the notion of the right of Allah does not prevent the use of the principle of necessity or reality to amend *hudud* ordinances. This can be seen clearly in the example of Umar Ibn al-Khattab who put the punishment for theft on hold during the year of famine.

The second factor that is preventing Islamic jurists from amending *hudud* ordinances is their view that the protection of religion has priority over the protection of individuals' rights, ie over the benefit of the people. As demonstrated in this chapter, this view has no legal justification since Allah made it clear that He is the one who defends the religion and that He does not need any help to do so. Hence, there is no legal justification for any defence of the religion by human effort, such as assigning punishments additional to those prescribed by Allah. Human efforts to protect the religion, thereby violating the benefit of the people, are thus even a violation of *Shariah*. An example of this is the earthly punishment for apostasy, namely death by execution, as well as an expansion of the definition of the crime of *haraba*, when Allah had declared that He would hold people accountable in the afterlife. These given examples can actually be considered violations of the right of Allah, since Allah pointed out that the protection of life is one of the highest values in Islam and that there is no compulsion in religion. *Shariah* further clearly indicates that the right of Allah is based on His forgiveness and that He hates to punish and loves to forgive and to show mercy.

The two aforementioned misconceptions, namely the view that the protection of religion has priority over the protection of individuals' rights, and the view that whatever concerns the right of Allah cannot be forgiven or questioned, can tragically be seen as the main source of the countless atrocities committed worldwide in the name of Islam, including all the executions for apostasy. If Islamic scholars were to obey the call of the Prophet in his Farewell Sermon and put all efforts into understanding the primary sources of *Shariah*, they should be able to discover and fix the aforementioned misconceptions and return to the real purposes of *Shariah*, namely to serve the benefit of the people and to protect them from harm. As can be seen from the Prophet's Farewell Sermon, it is the responsibility of Muslims of today to verify existing interpretations in the light of the primary sources of *Shariah* and its core values. Contemporary Islamic scholars and jurists should tackle the problems with *hudud* ordinances and clear from them those additional prescriptions that have been added by Islamic jurists without legal justification in the Qur'an and that contradict the main purpose of

Shariah, particularly those prescriptions that have been assigned as a human effort to protect the religion.

In so doing, they would be able to reconcile the *hudud* ordinances to twenty-first century circumstances and reconcile them with international human rights standards, and thereby would serve the benefit of the people in several ways. It would protect the human rights, eliminate the harm caused by the additional punishments assigned by Islamic jurisprudence, help restore the image of the Muslim society in the eyes of the world community and therefore help the leaders of Muslim countries to maintain good international relations without having to compromise or ignore *Shariah*. Muslims would be able to live peacefully and practice their religion without the fear of being rejected for following a backward or barbaric religion.

In fact, clearing Islamic law from those prescriptions that contradict the spirit and the core values of *Shariah* would actually help protect and restore the religion, and it would make it easy for people to reform their lives and to live in righteousness. As has been seen in this chapter, *Shariah*'s call is to relieve people of any unnecessary burden and to provide a great opportunity to those who have fallen into sin, thereby making it possible for them to repent and to amend their behaviour. *Shariah* points out that forgiveness is available, even for *hadd* crimes. It aims to rescue people and to give them hope, mercy and life.

The right of Allah, thus, is not a sufficient or legitimate justification to prohibit amendments to Islamic criminal law. *Shariah* allows for the application of the principles of reality and necessity whenever this is necessary to secure the benefit of the people or to prevent harm to them. It can be argued, therefore, that these two principles can be applied to avert the harsh and cruel *hudud* punishments, since they do not fit with the reality of life of the Muslim community in the twenty-first century and since they cause harm to the reputation of the Muslim community. The following chapter will explore further, how the *hudud* punishment can be adjusted to the reality of the twenty-first century in a religiously sensitive way while still securing the benefit of the people.

CHAPTER 6

AN ATTEMPT TO REFORM *HUDUD* ORDINANCES

I Introduction

Hudud ordinances are strongly criticised by the international community due to their harsh, cruel and discriminatory punishments that are in conflict with internationally recognised human rights.⁹¹⁷ Further, their enforcement damages the image and reputation of Islam and Muslims in the eyes of the world and causes them to be viewed as being backward or barbaric.⁹¹⁸ Some of the *hudud* prescriptions clash with *Shariah* itself, for despite *Shariah*'s call to relieve people of any unnecessary burden, Islamic jurists have developed the *hudud* ordinances in a way that makes peoples' lives even harder.⁹¹⁹ For example, they have assigned the death penalty for apostasy, though Allah declares that He would hold apostates accountable in the afterlife.⁹²⁰ This not only contradicts the qur'anic prescriptions concerning apostasy but also ignores Allah's repeated calls on Muslims to protect life and that He stressed that no one has the right to give or take life besides himself.⁹²¹ Remarkably, some of the harshest punishments for *hudud* crimes, including the death penalty for apostasy, and the stoning to death for adultery are not prescribed by *Shariah* but have been developed by Islamic jurisprudence.⁹²²

This chapter offers suggestions for a reform of *hudud* punishment in order to make them compliant with international human rights standards. In contrast to some moderate Muslim scholars who appeal for a complete moratorium on *hudud* ordinances, it is argued in this thesis that reforming *hudud* punishment by reconciling them with international human rights laws will be more beneficial on the long term, for if they were simply set aside they could easily be reintroduced at any time. Secondly, a call to abolish them will be a completely unacceptable option to orthodox Muslims and is therefore very unlikely to be considered in those countries that currently practice them. This thesis aims to bridge the gap between Muslim countries that still apply *hudud* ordinances and, in doing so, violate international

⁹¹⁷ Lau op cit note 719.

⁹¹⁸ Fahd Bin Saleh Ajlan 'Hta la yatahadas al-nas ana Muhammad Yaqtul Ashabuh' *Majalat al-Bayan* (May-June 2015) 336, available at <http://ar.islamway.net/article/48137/> accessed on 1 February 2016.

⁹¹⁹ Al-Alwani op cit note 207 at 37.

⁹²⁰ Surah 2:217.

⁹²¹ Surah 40:68.

⁹²² Ibid at 195.

human rights law, and those countries that care about the protection of human rights and consequently reject *hudud* ordinances. The suggestions for reformation provided in this chapter ensure the protection of human rights while providing enough evidence to justify them from an Islamic perspective. This chapter consists of three parts. The first is introductory in nature and explains why *hudud* ordinances need to be amended. It discusses the purposes of punishment and introduces the widespread contemporary Islamic theory according to which *hudud* ordinances can be applied in a perfect society only.⁹²³ Further, it discusses the aspect of deterrence, believed by orthodox Muslims to be the main purpose of *hudud* punishment.⁹²⁴ It is due to the focus on deterrence that the *hudud* punishments assigned by Islamic jurisprudence are so harsh and cruel.⁹²⁵ The chapter points out, further, that even in the Muslim world a paradigm shift can be noted. More and more Islamic scholars now stress the importance of the purpose of rehabilitation and appeal for the end to the use of corporal punishments.⁹²⁶

The second part of the chapter discusses the legal challenge in respect of amending *hudud* ordinances. One of the main challenges derives from the Islamic understanding that certain texts, known as ‘definite texts’ (*nusus qataiyah*), are immutable and cannot be questioned, and that *hudud* ordinances are part of these definite texts.⁹²⁷ It is argued that, despite this seemingly insurmountable obstacle, *Shariah*, known to be flexible enough to suit all times and every environment,⁹²⁸ indeed provides enough tools and principles that allow its main purpose to be fulfilled,⁹²⁹ this being to serve the benefit of the people.⁹³⁰ The principles of necessity and reality, and the principle of doubt are introduced as powerful instruments that allow for exceptions, even in respect of definite texts, if the reality of the life of the people requires so.⁹³¹

This chapter suggests a re-reading of the concept of the five indispensables, which aims to protect religion, life, intellect, offspring and property, but in its current interpretation

⁹²³ Abu Zahra op cit note 65 at 27.

⁹²⁴ Al-Dawlah op cit note 26.

⁹²⁵ Okon op cit note 67 at 227.

⁹²⁶ Muhammad Habash 'Al-hudud min al-tazib al-jasadi ela al-eqab al-islahi' 31 December 2014, available at <https://7al.me/2014/12/31/الحدودمنالتأديبالجسديإلىالعقابالإسلامي/>, accessed on 1 February 2016.

⁹²⁷ Al-Qaradawi op cit note 68 at 45.

⁹²⁸ Ahmed Mohamed Hunaiti 'Al-thabat wal-murunah fi al-Shariyah al-Islamiyah' 42 (2) 2015 413 *Majalat al-Shariah Wal Oanun*.

⁹²⁹ Umaamah op cit note 757 at 29.

⁹³⁰ Al-Hunaiti op cit note 928.

⁹³¹ Abdul Wahab op cit note 69.

focuses on the protection of religion and thereby violates human rights principles and some of the core values and teachings of *Shariah*.

The chapter also looks at several examples from the Qur'an and the *Sunnah* that demonstrate that Allah Himself considered the reality of the life of the people, and that the Prophet and his companions and successors applied these principles to suspend *hadd* punishments, if this was necessary for the benefit of the people. An example from the modern history of Islam shows how the aforementioned principles are applied in the contemporary Muslim community to ease the lives of Muslims.

The third and main part of this chapter discusses the *hudud* punishments individually and develops suggestions to reform them and to bring them into compliance with international human rights standards. It is important to note that this chapter does not suggest changing any of the relevant qur'anic texts, for it is committed to respect the authority of *Shariah*. As demonstrated in the previous chapter, reforming Islamic law does not mean to ignore or violate *Shariah*. The Islamic call for reformation is rather an appeal to Muslims to abide by the qur'anic core values, including the protection of equality and life, and to make sure that the teachings of the Qur'an and the correct *Sunnah* are applied in a way to fit with the reality of life of the relevant Muslim society. As demonstrated in Chapter 5, the Islamic concept of reformation can be understood as a call to cleanse Islamic law, including *hudud* ordinances, from interpretations that are in conflict with the primary sources of *Shariah*, its purposes and its core values.

When developing suggestions to reform *hudud* punishment, this part of the chapter employs a twofold approach, since two categories of *hudud* ordinances can be distinguished. On the one hand, there are those *hudud* crimes with punishments assigned in the Qur'an and are thus based on texts that are considered as 'definite'. This category includes the punishment of amputation for theft, flogging for adultery and defamation and 'execution, or crucifixion, or amputation, or exile' for the crime of *haraba*. The second category is represented by the *hudud* crimes with punishments that have been developed by Islamic jurists in the application of the method of *ijtihad*, namely the beheading for apostasy, flogging for drinking alcohol and stoning for adultery.

For those *hudud* punishments that have been assigned in the Qur'an, the previously mentioned principles of *Shariah*, predominantly the principles of reality and necessity are applied. For those *hudud* punishments that have been developed by Islamic jurists in application of the method of *ijtihad*, this chapter similarly uses *ijtihad* when examining the legal justifications employed by early scholars with the aim of developing suggestions for a

re-interpretation. This chapter develops — in a religiously and culturally sensitive manner — suggestions for alternative punishments that fit better with international human rights standards and that serve the fulfilment of the purpose of *Shariah* by securing the benefit of the Muslim community.

II Why amend *hudud* ordinances?

It is argued that *hudud* ordinances as defined by Islamic jurisprudence and practiced in several Muslim countries do not fit with the reality of life of the twenty-first century. Many leading Muslim scholars share this opinion. One of them is the former mufti of Egypt, Ali Jumah, who declared that ‘Sharia commanded us not to apply the *hudud* when it missed its conditions’.⁹³² In this statement, Ali Jumah refers to the widespread understanding that *hudud* ordinances can be applied in a perfect society only.⁹³³ This view derives from the understanding that punishment is just one of the three elements that need to work together to prevent and counter crimes to maintain a perfect society. The other two elements are the prevention of crimes through the regular practice of prayer, fasting, charity and good deeds, all of which are believed to restrain people from shameful and unjust deeds,⁹³⁴ and the cultivation of a high moral standard and a mature, godly public opinion.⁹³⁵ According to this understanding, a perfect society is one where all of its members practice prayers, fasting, charity and good deeds on a regular basis, and consequently do well and restrain themselves from doing shameful or unjust deeds. As a result, they will be able to discern what is good and what is evil. This will lead to the enjoyment of a high moral standard of the society, since people will enjoy what is good and detest what is evil. Consequently, there will be hardly any mischief. In such a perfect society harsh punishments are only an additional barrier to keep people from transgressing the line between good and evil. Deterrence, therefore, is viewed as the main purpose of punishment.⁹³⁶

Orthodox Muslims hold that the *hudud* punishments have been ordained by Allah as a form of discipline for the criminal and deterrence for others.⁹³⁷ This is why the punishments are meant to be harsh, cruel and humiliating and why corporal punishments and torture are

⁹³² Ali Jumah ‘Uqubat al-hudud beina al-taleq wal tadbeq’ *On Islam* 3 August 2011, available at <http://www.onislam.net/arabic/madarik/culture-ideas/90481-alsharea.html>, accessed on 7 August 2015.

⁹³³ Abu Zahra op cit note 65 at 27.

⁹³⁴ Surah 29:45, Surah 16:90 and Surah 9:103.

⁹³⁵ Surah 3:104.

⁹³⁶ Al-Otaibi op cit note 47 174.

⁹³⁷ Ibid at 11.

emphasised. Enforcing punishments publicly can be seen in the same light.⁹³⁸ The criminal is viewed as a bad person who should be eliminated from society. Purification of the criminal in a sense of atonement or a penalty for one's wrongs to improve his or her image in the eyes of Allah is another aspect included in the Islamic understanding of punishment.⁹³⁹

Worldwide, theories and approaches dealing with punishment and its purposes have changed significantly over the centuries. Independently of the different opinions concerning the main purpose of punishment, penalty usually serves many different purposes at the same time, namely, the purpose of justice, special and general prevention, atonement, retribution, and compensation for the victim. While orthodox Muslims see deterrence as the main purpose of punishment, the western world emphasises that its purpose is the rehabilitation of the criminal.⁹⁴⁰

Concerning the deterrent effect of *hudud* punishments, academic researchers have found that enforcing *hudud* punishments does not help to reduce the crime rate. The former Chief Justice of Malaysia, Tun Abdul Hamid Mohamad, discovered that 'Muslim countries which have implemented Islamic capital punishments, or *hudud*, have not been successful in reducing crime rate'. He had compared several Muslim countries that practice *hudud* laws with non-Muslim nations, and noticed that those countries that practice *hudud* laws were far behind in terms of tackling crime and establishing peace and justice.⁹⁴¹ Omer al-Faruk al-Huseini also declared that exaggeration in the cruelty of the punishment could not prevent the commission of crimes.⁹⁴² Another study concerning the deterrent effect of punishments shows that the death penalty is no more a deterrent than is long-term imprisonment.⁹⁴³

A good example of how effective imprisonment can be is the case of the prison system in Norway. It is considered the most effective worldwide and is recognised as one of the most humane. The effectiveness of the system, in terms of prisoner rehabilitation, can be seen in an unusually low incidence of recidivism.⁹⁴⁴ The Norwegian prison system focuses on repairing

⁹³⁸ Ibid.

⁹³⁹ Ibid at 147.

⁹⁴⁰ James Gilligan 'Punishment fails: Rehabilitation works' *The New York Times* 19 December 2012, available at <http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works>, accessed on 1 February 2016.

⁹⁴¹ Md Izwan 'Countries with hudud laws fail to reduce crime, says former top judge' *The Malaysian Insider* 11 February 2014, available at <http://www.themalaysianinsider.com/malaysia/article/countries-with-hudud-laws-fail-to-reduce-crime-says-former-top-judge>, accessed on 30 July 2015.

⁹⁴² Omer al-Faruk al-Huseini *Mabade elm al-Ijram wa al-Ikab* (2011) 151.

⁹⁴³ Michael L Radelet & Traci L Lacoock 'Do executions lower homicide rates: The views of leading criminologists' (2009) 99 *The Journal of Criminal Law & Criminology* 504.

⁹⁴⁴ The rate of prisoners who are re-arrested within five years after being released is as low as 20% in Norway, in contrast to the recidivism rate of, for example, 76 per cent in the United States of America. Alexia D Cooper, Matthew R Durose & Howard N Snyder 'Recidivism of prisoners released in 30 states in 2005: Patterns from

the harm caused by crime and on rehabilitating prisoners rather than on punishing them.⁹⁴⁵ The aim is to make sure that by the time the prisoners are released into society, they are rehabilitated, not angry. The prison facilities, therefore, incorporate ‘cognitive-behavioural programs rooted in social learning theory’ that are ‘the most effective at keeping ex-convicts out of jail’.⁹⁴⁶ The initial sentences compared to those of other countries are quite low,⁹⁴⁷ but in the case where the person is considered not to be fully rehabilitated after the period of imprisonment, the sentence is imposed for another five years. In this way, the prison system can guarantee that prisoners are not released before being considered fully rehabilitated.⁹⁴⁸

A paradigm shift from deterrence towards rehabilitation can be noticed, even in the Muslim world. Today, more and more Muslim scholars stress the importance of the rehabilitation of criminals with the purpose of returning them to the society as good and potentially fruitful members of the community.⁹⁴⁹ The scholars who hold to this view call for the protection of the human dignity of the criminal⁹⁵⁰ and stress that the punishment should not be viewed as an act of retribution or revenge against the criminal, but rather as a method to correct and rehabilitate him.⁹⁵¹ Some scholars compare the criminal to a sick person who needs treatment and a period of rehabilitation.⁹⁵²

This paradigm shift is accompanied by a call to examine every case individually, and to consider the psychological and environmental reasons, among others, that drew the offender to a life of crime.⁹⁵³ It is argued in this thesis, therefore, that it would be helpful to treat all *hudud* crimes with *ta'zir* punishments to be flexible enough to consider each case individually. This would be beneficial for the rehabilitation of criminals and, consequently, for the Muslim society as a whole. In this light it can be seen that some scholars, like Sheikh

2005 to 2010’ (22 April 2014) *Bureau of Justice Statistics* 2014, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>, accessed on 12 January 2016.

⁹⁴⁵ Toby Helm & Jamie Doward ‘Longer prison terms really do cut crime, study shows’ *The Guardian* 7 July 2012, available at <http://www.theguardian.com/law/2012/jul/07/longer-prison-sentences-cut-crime>, accessed on 12 January 2016.

⁹⁴⁶ Ibid.

⁹⁴⁷ Christina Sterbenz ‘Why Norway’s prison system is so successful’ *Business Insider* 11 December 2014, available at <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12>, accessed on 12 January 2016.

⁹⁴⁸ Helm & Doward op cit note 945.

⁹⁴⁹ Al-Huseini op cit note 942 at 151–2; Abdul Latif al-Shirazi al-Sabagh *Dawa Tanaqod Ahkam al-Hudud wa Fehm al-Hader* (1976) 7.

⁹⁵⁰ Al-Huseini op cit note 942 at 151–2.

⁹⁵¹ Al-Sabagh op cit note 949.

⁹⁵² Al-Huseini op cit note 942 at 160.

⁹⁵³ Al-Sabagh op cit note 949.

Abdullah al-Alayli, are in favour of *ta'zir* punishments even for *hudud* crimes, since fixed punishments fail to consider the individual circumstances of each case.⁹⁵⁴

Further, more and more Islamic scholars advocate the abandonment of cruel and harsh corporal *hudud* punishments and their replacement with prison sentences,⁹⁵⁵ the more so as they clash with the Qur'an itself that contains many reasons to reject the death penalty. One of them is that Islam promotes life and the Qur'an explicitly stresses the importance of the protection of human life in the eyes of Allah.⁹⁵⁶

The method of carrying out the punishments publicly, furthermore, is very humiliating and thus a violation of human dignity. This humiliating method does not only hurt the convict and clash with international human rights principles but at the same time is in conflict with the Islamic call to protect human dignity and the sanctity of the human body, promoted by both the Qur'an and the correct *Sunnah*.⁹⁵⁷

A call to put an end to corporal punishment, thus, comes from both inside and outside the Islamic world. The conflict between international human rights law and the corporal *hudud* punishments of flogging, amputation, stoning and crucifixion was discussed in Chapter 3. There it was pointed out that harsh and cruel punishments are outlawed by the international ban on torture, and that the death penalty by itself is condemned by international human rights laws that call to abolish it or, at least — as a first step — to put a moratorium on it.

This call to end corporal punishments and the death penalty is countered by orthodox Muslims who claim that *hudud* punishments cannot be averted or amended, since they reflect explicit orders by Allah and are based on what is known as definite texts.⁹⁵⁸ Any attempt to amend *hudud* ordinances has, therefore, to deal with the predominant and challenging claim that the definite texts of *hudud* ordinances cannot be questioned or amended. This important question will be discussed in the following section.

⁹⁵⁴ Abdallah al-Alayli *Ayna al-Chatta* (1992) 92.

⁹⁵⁵ Al-Sabagh op cit note 949.

⁹⁵⁶ See for example Surah 5:32.

⁹⁵⁷ See for example Surah 17:70.

⁹⁵⁸ Al-Sayed Sabeq *Fiqh al-Sunnah* 4 ed (1983) vol 2 at 240.

III The legal challenge and approaches to amending *hudud* ordinances

(a) The challenge of the ‘definite’ texts

The main obstacle for any attempt to amend *hudud* ordinances in order to put an end to their cruel corporal punishments is the notion that they are part of what is known as ‘definite texts’ (*nusus qataiyaht al-dilala*).⁹⁵⁹ Most Islamic scholars of the four Sunni schools believe that definite texts are immutable and cannot be re-interpreted, amended or compromised.⁹⁶⁰ The notion of the ‘definite texts’ is based on Surah 3:7 that points to the difference between the ‘basic or fundamental’ verses ‘of established meaning’ in contrast to those that are ‘allegorical’ and need interpretation. The verse speaks about the Qur'an as the book sent by Allah and explains:

In it are verses basic or fundamental (of established meaning); they are the foundation of the Book: others are allegorical.

About 90 per cent of the qur'anic texts are known to be texts of allegorical or presumptive meaning (*nusus zaniyaht al-dilala*) that require interpretation and the application of *ijtihad* to identify their real meaning.⁹⁶¹ About 10 per cent of the qur'anic texts, however, are believed to be such ‘definite’ texts, thus having a clear, specific meaning. This is especially the case with all the texts that concern faith and rituals (*fiqh al-ibadat*). The principle of monotheism, the notion of paradise and hell and the principle of reward and punishment are all considered to be such definite texts, as are all prescriptions defining what is prohibited and permissible. This is why *hudud* ordinances are believed to be part of the definite texts.

It is argued here that those *hudud* punishments that have indeed been assigned in the Qur'an can be considered to be definite texts, but those that have no legal justification in the Qur'an, consequently, cannot be claimed correctly as definite texts. As has been demonstrated in Chapters 2 and 3, the notion of *hudud* ordinances as a divinely assigned set of crimes and punishments can be refuted on several grounds. One of them is the fact that the set of crimes as defined by Islamic jurisprudence cannot be found in the Qur'an or the correct *Sunnah*. Quite the contrary, the set of *hudud* ordinances can even be argued to contradict *Shariah*, since it is not identical with the set of crimes described in a correct *hadith* as the seven worst

⁹⁵⁹ Nouredine Omar *Uhum al-Qur'an* (1993) 121.

⁹⁶⁰ Ibid.

⁹⁶¹ Ibid.

and abominable crimes known as the ‘seven great destructive sins’.⁹⁶² The fact that the list of *hudud* ordinances does not match the seven crimes listed in the aforementioned correct *hadith* is a strong argument refuting the notion that the *hudud* ordinances are a divine set of crimes and punishments. The main argument, however, to refute the notion of *hudud* ordinances as a fixed set of divine prescriptions, is the fact that several of the punishments have no legal basis in the Qur'an, but have been developed by Islamic jurists.

It can actually be argued that due to the notion of the immutability of the definite texts, the Islamic jurists should not have interfered with the qur'anic prescriptions concerning the *hudud* crimes in first place. Their assignment of earthly punishments in instances where Allah has declared that he would hold offenders accountable in the afterlife can be seen as a violation of *Shariah*. This is seen particularly as regards the crime of apostasy, and when the jurists have assigned punishments that go beyond what has been assigned in the Qur'an, such as assigning stoning for adultery, while the Qur'an has assigned flogging. The assignment of amputations for theft that are more severe than the amputation of the hand can be seen in the same light, namely as a violation of *Shariah*.

Regardless of the questionable legitimacy of part of the *hudud* prescriptions, those *hudud* punishments that have indeed been assigned by the Qur'an — and can be considered to be definite texts — might seem to represent an insurmountable obstacle for any attempt to reform *hudud* punishment. This chapter, however, demonstrates that *Shariah*, known to be flexible enough to suit all times and every environment, has indeed proved itself to be sufficiently flexible to reconcile *hudud* punishment with the reality of the life of Muslims in the twenty-first century. This flexibility is present, thanks in particular, to the principles of reality and necessity.

(c) The principles of necessity and reality (*fiqh al-darurah*, *fiqh al-waqa*)

The principles of reality and necessity that were introduced in Chapter 5 are two strong instruments given by *Shariah* to secure its purposes (*maqased al-Shariah*), namely the benefit of the people and protecting them from harm. The principles explicitly allow for exceptions, ie, to make the prohibited permissible if there is a necessity (*darura*) to do so or if the reality (*al-waqa*) is such that it is required to secure the benefit of the people and prevent them from

⁹⁶² *Sahih al-Bukhari* (1997) vol 8 at 447 *hadith* 6857; *Sahih Muslim* (2007) vol 1 at 177 *hadith* 262.

The seven ‘worst sins’ listed in the *hadith* are: ‘Associating others with Allah (*Shirk*); witchcraft; killing a soul whom Allah has forbidden us to kill, except for a right that is due; consuming orphans’ wealth; consuming *Ribâ* [taking interest]; fleeing from the battlefield; and slandering chaste, innocent women.’

harm.⁹⁶³ It is due to these principles that *Shariah* is praised because, thanks to the degree of its flexibility, it is able to suit all times and every environment.⁹⁶⁴ It is argued in this thesis that, with the help of the principles of reality and necessity, it is even possible to reform *hudud* punishment in such a way that they will be reconciled with international human rights standards and to be acceptable to the world of today.

The principles of reality and necessity take note of the reality of life, which changes with place, time, reality and custom. While the majority of Muslim scholars view these four aspects as influencing the reality of life, the famous contemporary orthodox scholar Sheikh al-Qaradawi lists six additional cases that can require and justify the amendment of definite provisions. These are (1) the increased level of sin and mischief (*umum al-balwa*); (2) the changes of the social, economic and political reality; (3) the changing of needs; (4) the changing of the abilities of the people; (5) the revolution of information; and (6) the changes of the way of thinking of the people.⁹⁶⁵

It is argued in this thesis that the *hudud* prescriptions, as developed by Islamic jurisprudence and practiced in several Muslim countries, do not fit in with the reality of twenty-first century life. They are viewed by non-Muslims as a barbaric, medieval and a backward form of punishment. This understanding causes great harm to the reputation of Islam and the Muslim community. Ali al-Hail said: ‘The implementation of *hudud* [the traditional *hudud* ordinances] in our time of today does not serve Islam — it brings rather damage and harm.’⁹⁶⁶ The former mufti of Egypt, Ali Jumah, similarly declared that ‘[t]he current era is considered as [an] age of necessity’ and that ‘Sharia commanded us not to apply the *hudud* when it missed its conditions’.⁹⁶⁷

It is argued here that it is necessary for Muslims to do whatever they can to protect and restore their image and reputation and that this includes reforming *hudud* punishment, since the reality of life of the Muslim world of the twenty-first century, including the commitments to abide by international human rights laws that have been signed by most Muslim countries (see Chapter 3), requires them to do so.

Some Muslim scholars have stressed that it is very important not to think in terms of the methods of punishment in use in the Arabian Peninsula of the seventh century only, but to take into consideration where and how Muslims of today are living in every corner of the

⁹⁶³ Al-Sakhawy *Al-Maqased al-Hasanah* (1989) 269; Surah 6:119; Surah 2:173.

⁹⁶⁴ Al-Awa op cit note 749 at 261, 264.

⁹⁶⁵ Yusuf al-Qaradawi *Mugibat Tagjir al-Fatwa fi Assrina* (2008) 40.

⁹⁶⁶ Ali al-Hail ‘Qiraa asriyah li tadbiq al-hudud wifqan li ahkam al-shariah’ *Al-Rai al-Yum* 5 February 2015, available at <http://www.raiaiyoun.com/?p=214304>, accessed on 30 July 2015.

⁹⁶⁷ Jumah op cit note 932.

world.⁹⁶⁸ The economic and social injustice and political corruption, for example, that shape the reality in many Muslim countries, are factors that have to be taken into consideration. They can require and justify exceptions, even from definite texts. It is argued that economical and social injustices in Muslim countries are themselves reason enough to avert *hudud* punishments. This conclusion can be drawn from a comparison with times of war or famine. The correct *Sunnah* reports that the *hadd* punishment for theft was suspended during a time of famine.⁹⁶⁹ During a time of war it was also suspended to prevent Muslims from leaving Islam and joining the enemy's camp.⁹⁷⁰ Ibn Khattab even explicitly ordered his governors to suspend the enforcement of all *hudud* punishment during times of war for the purpose of preventing those people who had committed *hadd* crimes from deserting to the enemy's camp in order to escape the *hadd* punishment.⁹⁷¹ The majority of Muslim scholars agree therefore that *hudud* punishments have to be suspended during times of war to avoid the possibility that Muslims will leave Islam.⁹⁷² It is argued that this logic applies also to times of economic and social injustice. Another aspect of the reality of life of the twenty-first century is increasing globalisation and the influence of the internet and other media that make it even easier for Muslims to leave their faith if they feel pushed away from Islam because, for example, of its adherence to cruel and inhumane punishments. Sheikh al-Qaradawi stresses the importance of considering the realities of life and the purposes of *Shariah*. He is critical of the fact that many Islamic scholars and jurists ignore the jurisprudence of reality and do not give the reality of life the same attention as they do to the books of the ancient scholars. He concludes that this is why their *fatwas* are completely out of time and unrealistic.⁹⁷³

Besides the principles of reality and necessity that allow for exceptions from definite texts, the principle of doubt is another principle given by *Shariah* to fulfil its purposes.

(d) The Islamic principle of doubt (*shub'ha*)

The Islamic principle of doubt (*shub'ha*) aims to protect justice and protect people from the miscarriage of justice.⁹⁷⁴ It can be compared to the internationally known and respected principle of '*in dubio pro reo*'. The Islamic principle of doubt (*shub'ha*) is based on a statement of the Prophet Muhammad in which he declared that *hudud* punishments are to be

⁹⁶⁸ Abdul Majid al-Najjar *Maqased al-Shariah* (2006) 272.

⁹⁶⁹ Hashwah op cit 864.

⁹⁷⁰ Muhammad Abu Zahra *Al-Uqubah fi al-Shariah al-Islamiyah* (2008) 354.

⁹⁷¹ Abdullah Ibn Ahmad Ibn Qudamah *Al-Mughni* (1997) vol 13 at 173.

⁹⁷² Ibid.

⁹⁷³ Al-Qaradawi op cit note 965 at 98.

⁹⁷⁴ Audah op cit note 252 at vol 1 at 216.

averted if there is any doubt (*shub'ha*): 'Avert *hudud* (punishment) when there are doubts (*shub'ha*).'⁹⁷⁵

According to a similar and closely connected *hadith* reported by Aisha, the Prophet declared that legal penalties should be avoided as much as possible. He actually encouraged his followers to look for any way to avoid the punishment:

Avert the legal penalties from the Muslims as much as possible, if he has a way out then leave him to his way, for if the Imam makes a mistake in forgiving it would be better than making a mistake in punishment.⁹⁷⁶

Umar Ibn al-Khattab also declared that dropping *hudud* punishments because of doubt was more loveable to him than enforcing them with doubt.⁹⁷⁷ The desire to avoid punishment can also be seen in the call of the Prophet to rather cover the sins of a fellow Muslim than expose them:

Whoever relieves a Muslim of a burden from the burdens of the world, Allah will relieve him of a burden from the burdens of the Hereafter. And whoever covers (the faults of) a Muslim, Allah will cover (his faults) for him in the world and the Hereafter. And Allah is engaged in helping the worshipper as long as the worshipper is engaged in helping his brother.⁹⁷⁸

The principle of doubt is, thus, very wide. According to it, *hadd* punishment should be avoided if there is the least doubt or if any kind of excuse can be found. The call to avert punishment as much as possible reflects the purpose of *Shariah* to serve the benefit of the people and to protect them from harm.

A case of doubt, for example, can be seen in respect of the crime of theft, for the punishment assigned in the Qur'an is to 'cut the hand', is not fully clear. As will be discussed further in this chapter, it could have a metaphorical meaning as well, or refer to inflicting an injury. Consequently, it can be argued that — due to the aspect of doubt — the punishment of amputation has to be averted.

The punishment of stoning for adultery can also easily be refuted by the principle of doubt, for the Qur'an does not mention stoning to death as a method of punishment, and the *ahadith* used as a legal justification for the stoning are mostly weak, and there is a lack of agreement (*ijma*) about it on the part of the jurists.⁹⁷⁹

⁹⁷⁵ Ali al-Mutaqi *Indian Kanz al-Ummal fi Sunan al-Af'al wa al-Aqwal* (2005) 636; Ismail Bin Mohammed al-Ajlouni al-Jarahi *Kashf al-Khafa* (1932) vol 1 at 71.

⁹⁷⁶ *Sunan at-Tirmidhi* (2007) vol 3 at 208 *hadith* 1424; *Sahih Tirmidhi*, English translation vol 3, bk 15 *hadith* 1424; *Sunan Ibn Majah* (1998) *hadith* 2545.

⁹⁷⁷ Ibn Abi Shayba *Al-Musannaf* (1988) *hadith* 27926.

⁹⁷⁸ *Sunan at-Tirmidhi* (2007) vol 3 at 210 *hadith* 1425.

⁹⁷⁹ Mahmud op cit note 424 at 118.

While *shub'ha* means 'doubt', the way that this principle is used is very wide and encompassing. This can be seen, for example, in the aforementioned notion, shared by many Islamic scholars, that *hudud* punishment can be enforced only in a perfect society. This notion is based on the principle of doubt, for it derives from the view that social, political and economic injustices and corruption can be considered as constituting doubt and thus can justify the suspension of *hudud* punishments.⁹⁸⁰

That *hudud* punishment as developed by Islamic jurisprudence conflict with *Shariah* that calls to protect life and promotes religious freedom can also be seen as an aspect of doubt. This requires that *hudud* punishments be averted, particularly since several of the *hudud* punishments have no legal justification in the Qur'an.

In summary, it can be argued that the principle of doubt and the principles of reality and necessity require that the reality of the life of the people is taken into consideration so that it serves the aim of securing their benefit and protecting them from harm, and since the reality of life is such that the enforcement of *hudud* punishments seriously harms human rights and the reputation of Islam and Muslims, the said principles justify averting or amending the traditional *hudud* punishment.

The following examples from the Qur'an and the *Sunnah* demonstrate that Allah himself considered the reality of life of the Muslim community and that the Prophet Muhammad, his companions and successors also applied the principles of reality and necessity or the principle of doubt to amend or avert even definite provisions if this was necessary for the benefit of the people or to protect them from harm.

(e) Examples of the amendment of definite texts

Examples of the application of what is known as the 'Islamic legal concept of amendment of definite provisions' (*tagyir al-ahkam al-qataiyah*) can be seen in both the Qur'an and in the *Sunnah*, as well as in the modern history of Islam.

i. Examples from the Qur'an and *Sunnah* for the amendment of definite provisions

In the Qur'an, several examples are found that demonstrate that Allah himself repeatedly changed provisions that were based on definite texts that he had previously assigned. While this by itself cannot be taken as a justification for human efforts to amend definite provisions, it can show, however, that even definite provisions are not absolutely immutable and are not

⁹⁸⁰ Jumah op cit note 932.

above the benefit of the people. One example can be seen concerning the distribution of inheritance. First, Allah had ordered a person who was about to die to issue a last will/testament (*wasiyah*) with instructions in it how to distribute his goods after his death.⁹⁸¹ Later, however, Allah overruled his order by giving specific instructions as to the distribution of a deceased estate.⁹⁸² It is assumed that the new ruling aims to guarantee justice, since a human will can be unjust. This example can be taken as evidence that Allah considered the life circumstances of people and, if necessary, even amended or cancelled his own previously given orders in order to better fit with the reality of life of the people. Thus he amended or cancelled definite provisions for the sake of the benefit of the people.

Another example found in the Qur'an shows that Allah changed a *hadd* punishment that he had previously assigned, namely the punishment of house arrest that he had assigned for women 'guilty of lewdness' (*fahisha*).⁹⁸³ It was later abrogated by the verse that assigns flogging for adultery or fornication (*zina*).⁹⁸⁴

In the *Sunnah* there are many examples that show that the Prophet Muhammad and his companions and successors also repeatedly amended or suspended *hudud* punishments if this was necessary for the benefit of the people or in cases of doubt. Hence, they applied the principles of necessity, reality and doubt. One *hadith* reports, for example, that the Prophet Muhammad avoided harsh punishment and rejected killing a hypocrite for the sake of protecting the image of Islam. The correct *hadith* tells of a man named Abdullah bin Ubai bin Salul who is described as a hypocrite. When one of the followers of the Prophet Muhammad suggested killing him, the Prophet Muhammad refused to do so, explaining that he avoided imposing harsh punishment in order to protect his reputation and to prevent anyone from saying that Islam is a violent religion, or the Prophet a murderer.⁹⁸⁵

Another correct *hadith* reports that the Prophet Muhammad forgave a *hadd* crime. According to the *hadith* a man came to the Prophet Muhammad to confess that he had committed a 'legally punishable sin' (a *hadd* crime). He did this three times and asked to be punished for his sin. After the third time, the Prophet replied that since the man had fulfilled the (*salat*) prayer together with the Prophet, his sin was forgiven.⁹⁸⁶

Even the *hadd* punishment for theft assigned in the Qur'an can be suspended and forgiven, as can be seen in several *ahadith*, including the example of the caliph, Umar Ibn al-

⁹⁸¹ Surah 2:180.

⁹⁸² Surah 4:7.

⁹⁸³ Surah 4:15.

⁹⁸⁴ Surah 24:2.

⁹⁸⁵ *Sahih al-Bukhari* (1997) vol 4 at 443–4 *hadith* 3518.

⁹⁸⁶ *Ibid* at vol 8 at 427–8 *hadith* 6823.

Khattab, who suspended the punishment for theft during the year of famine (see Chapter 5). Further, the Prophet Muhammad declared in a correct *hadith*, that the commission of the crimes of adultery and theft does not exclude a person from entering paradise.⁹⁸⁷

Another example of the amendment of a definite ruling by one of the Prophet's successors can be seen in the report on Umar Ibn al-Khattab who compromised the qur'anic prescription of the religious tax (*jizyah*). This tax was imposed on the Jewish and Christian subjects of Muslim rulers as an indication of their submission and humiliation (Surah 9:29). When the Arabic Christian tribe of Bani Taghlib declared that they were unhappy with the term *jizyah* due to its humiliating reference to submission, Umar Ibn al-Khattab granted their request to call the tax 'charity' or 'alms' instead of *jizyah*. He did this as he feared that if he did not they might rebel against him and join the enemy. In agreeing to their request, he compromised the qur'anic prescription that was, in fact, a definite order.⁹⁸⁸ Hence, al-Khattab took the liberty of departing from the qur'anic letters themselves and giving recognition to the main purpose of the text, ie, to preserve the power and authority of the Islamic state on the one hand, and ensure that the financial benefits of the tax would continue on the other, even though it was changed from *jizyah* to charity.

ii. Example in the modern history for the amendment of definite provisions

A contemporary example that shows how a definite provision was compromised for the sake of the Muslim people, can be seen in the *fatwa* issued by the Islamic European Council that allows Muslims living in Europe to compromise the prohibition of *riba* (bank interest), for getting a loan from the bank to buy a house. This example shows that a definite prohibition based on both the Qur'an and correct *Sunnah*, actually listed as one of the seven great destructive sins, was compromised to serve the benefit of the people and to protect them from harm. The Islamic European council justified the *fatwa* on the grounds of changing times, place and reality. They considered that Muslims today are no longer living in Muslim countries only, and the reality of the Muslims living in Europe is such that they need to obtain loans from banks.⁹⁸⁹

In summary, it can be concluded that the legal challenge presented by the definite texts is not insurmountable, since *Shariah* is indeed flexible enough to deal with all circumstances and to fit in all times and environments. The principles of reality and necessity and the

⁹⁸⁷ *Sahih Muslim* (2007) vol 1 at 181 *hadith* 273.

⁹⁸⁸ Yusuf al-Qaradawi *Ghair al-Muslimin fi al-Mujtama' al-Islami* (1992) 51.

⁹⁸⁹ Yusuf al-Qaradawi *Fiqh al-Aqaliyat al-Muslima* (2001) 154, 188.

principle of doubt allow and require to consider the reality of life of the people and to have their benefit in mind.

Before turning to discussing how these principles can be applied to the individual *hadd* crimes and punishments, it is necessary to look at the widespread interpretation of the five indispensables that is one of the reasons behind some of the very harsh and cruel *hudud* punishments.

(f) Re-reading the five indispensables

The traditional reading of the notion of the protection of the five indispensables (religion, life, intellect, offspring and money) plays quite a misleading role, and contributes significantly to the conflict of *hudud* ordinances with human rights, as has been pointed out in Chapter 5. While the protection of the five indispensables is supposed to secure the purposes of *Shariah*,⁹⁹⁰ thus the benefit of the people, they are traditionally interpreted in a way that works counterproductively, since the protection of religion is given priority ahead of the other four indispensables, these being the protection of life, intellect, offspring and money. While these four indispensables are in full compliance with the purpose of *Shariah* of securing the benefit of the people⁹⁹¹ and with internationally protected human rights,⁹⁹² the traditional understanding of the protection of religion can lead to violations of the rights of the individual.⁹⁹³ This is particularly the case when a person wants to leave Islam.⁹⁹⁴ It is presumably for the purpose of protecting their religion that Islamic jurists have established an earthly punishment for apostasy and that they have widened the definition of *haraba* from a physical fight against Allah or His Messenger to include even those statements critical of Islam or insulting to the Prophet Muhammad. Both of these *hudud* prescriptions, however, actually violate *Shariah*'s promotion of freedom of religion. Surah 2:256, for instance, states that there is no compulsion in religion, and Surah 18:20 declares, 'Let him who will believe, and let him who will, reject (it).'

This traditional reading is what the contemporary radical Islamic groups understand. It clashes with the needs of the Muslim society in the twenty-first century and contributes significantly to the bad image that the Islamic community has in the eyes of the rest of the

⁹⁹⁰ Al-Namlah op cit note 881 at 12; Al-Ghazali op cit 879.

⁹⁹¹ Ismail op cit note 849.

⁹⁹² Emara op cit note 883.

⁹⁹³ Al-Namlah op cit note 881 at 16.

⁹⁹⁴ Mohammed al-Ansari al-Rassa *Shareh Hudud Ibn Arafah* (1993) 664.

world.⁹⁹⁵ Since the main purpose of *Shariah* is to serve the benefit of the people, it is argued that the protection of religion must also serve this purpose. The protection of religion should, therefore, not be elevated above the other four indispensables and should not be applied in a way to limit the human rights of people, but should rather protect them.⁹⁹⁶ Protection of religion, therefore, should be interpreted as the protection of freedom of religion, including freedom of opinion. Only with this reading will the concept of the five indispensables be fully compatible with *Shariah*, its purpose and core values. It is this reading of the protection of religion on which the suggestions for reforming *hudud* punishment developed in the following section are based.

IV Suggestions for amending *hudud* ordinances

This section develops suggestions for alternative punishments for each of the *hudud* crimes. It is argued that since *hudud* ordinances in their traditional form as defined by Islamic jurisprudence harm the reputation of the Muslim community in the world and clash with human rights principles, the negative impact on the Muslim community caused by their enforcement cannot be, and has to be countered for the benefit of the Muslim community. The traditional *hudud* punishment might have been appropriate in their own historical and cultural context, but today they clash with international human rights and damage the reputation of Islam and Muslims severely. Hence, they violate the benefit of the people, and thus clash with *Shariah* itself. In contradiction to some contemporary Muslim scholars who call on for a complete freeze or abolition of *hudud* ordinances, it is argued here that it will be more helpful in the long term to reconcile them with international human rights by reforming the punishments rather than simply calling for their abolition, for if they were simply set aside, they could easily be re-enforced any time. Further, it is assumed that an appeal for abolition is very likely to be rejected by orthodox Muslims for the reasons discussed in detail in Chapter 3. One of these is that such an appeal would be considered as an assault on Islamic identity. This thesis is committed, therefore, to be fully loyal to *Shariah* and to take the religious and cultural background of conservative Muslims into consideration. It is argued that

⁹⁹⁵ David G Savage ‘Donald Trump’s proposed ban on Muslim immigrants could be legal, scholars say’ *Los Angeles Times* 14 December 2015, available at <http://www.latimes.com/nation/la-na-muslim-ban-legality-20151214-story.html>, accessed on 3 February 2016.

⁹⁹⁶ Audah, Gasser *Al-Ijtihad al-Makassedi min al-Tasawor al-Usuli Ela al-Tanzil al-Amali* (2013) 30; Al-Shabakah al-Arabiyah Lel Abhas Wal Nasher, Beirut.

none of the crimes, defined as such in the Qur'an, can be simply ignored or set aside as 'outdated'.

The suggestions developed in this section are more compatible with international human rights standards while still being in full agreement with *Shariah* and its purposes, ie, to focus more on the rehabilitation of the offender, while still fulfilling the purposes of justice and deterrence.

As previously mentioned, this thesis advocates treating all *hudud* crimes with *ta'zir* punishments to be flexible enough to consider each case, especially the severity of the crime, individually. The imposition of what are clearly unjust penalties can harm the reputation of Islam and should therefore be avoided. Further, *ta'zir* punishments allow for rehabilitation and thus serve the benefit of the individuals and the Muslim society. Since a *ta'zir* punishment gives the judge the liberty to choose any penalty he deems appropriate, a penalty range needs to be assigned for each crime to assure justice and to avoid arbitrariness.

A legal justification for changing the *hadd* punishment to *ta'zir* punishment can be found in the *hadith* that reports that even the Prophet Muhammad declared that a *hadd* punishment could be compromised if this is necessary to prevent harm to the reputation of Islam.⁹⁹⁷

The following discussion of the individual *hudud* crimes commences with an examination of those crimes whose punishments have been developed by Islamic jurisprudence.

(a) *Hudud* prescriptions developed by Islamic jurisprudence

This section focuses on those *hudud* prescriptions that have been developed by Islamic jurisprudence without or with weak or questionable legal justification in the Qur'an or the correct *Sunnah*. These are the stoning to death of married adulterers, flogging with 80 lashes for drinking alcohol and the death penalty for apostasy. Just as these prescriptions have been developed by the application of the method of *ijtihad*, this section applies the same method to develop suggestions to reform them.

Even though any effort made to use *ijtihad* is a human one, based on human opinions, and thus not infallible, *Shariah* praises any effort made to apply *ijtihad* as honourable⁹⁹⁸ and praiseworthy and declares that any effort of interpretation will be rewarded, even if the interpretation is wrong; and if it is correct it will be doubly rewarded.⁹⁹⁹ It is argued, therefore, that it is absolutely legitimate to reconsider the aforementioned *hudud* prescriptions

⁹⁹⁷ *Sahih al-Bukhari* (1997) vol 8 at 427–8 *hadith* 6823.

⁹⁹⁸ Ibn Ashour op cit note 132 at 408.

⁹⁹⁹ *Sahih al-Bukhari* (1997) vol 9 at 271 *hadith* 7352.

that have been developed by Islamic jurists, the more so as many of the *ahadith* that have been used as the legal basis and justification for the assigned penalties are weak and, therefore, not strong enough to justify harsh and cruel punishments.¹⁰⁰⁰

It is argued, further, that the effort to question and reconsider the *hudud* prescriptions developed by Islamic jurists, in fact fulfils the appeal of the Farewell Sermon, in which the Prophet Muhammad had stressed that it is the responsibility of Muslims of every generation to go back to the primary sources of *Shariah* and to interpret them in a way to suit their own time.¹⁰⁰¹

i. Beheading for apostasy (*al-riddah*)

The punishment of beheading for leaving Islam has no legal justification in the Qur'an or the correct *Sunnah*. According to Islamic jurisprudence, however, an apostate has only three days to repent and to return to Islam, otherwise the punishment of beheading by a sword has to be carried out before the sunset of the third day.¹⁰⁰² This punishment is based on several *ahadith* that are all weak and thus not sufficient evidence to support the death penalty.

One of the famous texts used to justify the death penalty for apostasy is a *hadith* that gives a report of the Prophet Muhammad's return from his famous night journey. The *hadith* reports that when the Prophet Muhammad shared his account of the journey, 'some people said: "We believe in what Muhammad is saying." Others turned away from the faith and Allah cut their necks along with Abu Gahel.'¹⁰⁰³ It is important to note, though, that the apostates were not killed when they left Islam, but because they joined the camp of the enemy, these being the Meccan idol-worshipping tribe of the Quraish. Later, during the famous war of Badr, when many of the Quraish people were killed by the Prophet and his army, the apostates who had joined the Quraish were killed 'along with Abu Gahel',¹⁰⁰⁴ the commander of the Quraish army. Hence, they were not killed for leaving Islam, but died as fighters (*muharibin*) when they were physically attacking the messenger of Allah and the Muslim community. Consequently, this *hadith* represents an example of the crime of *haraba* since it speaks about fighting against Allah and His Messenger and it is not a strong enough evidence to justify the death penalty for apostasy. It can even be seen as disproving the death penalty for apostasy since it shows that the Prophet did not go after the apostates and they did

¹⁰⁰⁰ Al-Ashmawy op cit note 409.

¹⁰⁰¹ *Sahih al-Bukhari* (1997) vol 2 at 450 *hadith* 1739.

¹⁰⁰² Ibn Taymiyyah op cit note 381.

¹⁰⁰³ Ahmad Ibn Hanbal *Musnad al-Imam Ahmed* (1993) vol 1 at 374 *hadith* 3546.

¹⁰⁰⁴ Ismail Ibn Umar Ibn Kathir *Al-Bedayah wal Nihayah* (1997) vol 5 at 573.

not suffer any negative consequences from leaving Islam until they engaged in a physical struggle against the Prophet and his people.

Another *hadith* concerning apostasy is the one narrated by Ibn Omr, according to which the Prophet Muhammad said: ‘[I]f a man says to his brother: You are *kafir* (infidel/apostate), one of them will [really] be [infidel/apostate].’¹⁰⁰⁵ This means that either the accusation is true, or if it is false, the accuser will be considered a *kafir* for falsely accusing his Muslim brother. It is noteworthy that, according to this *hadith*, the Prophet did not assign any punishment. Consequently, this *hadith* also provides no justification for the punishment of infidels or apostates. It can even be seen as proving the opposite, namely, that apostasy has no worldly punishment.

The most famous *hadith* used as justification for the punishment for apostasy is the *hadith* according to which the Prophet Muhammad said: ‘Whoever change[s] his religion, kill him.’¹⁰⁰⁶ As mentioned in Chapter 2, this is a weak *hadith*, since Ikrimah, who is one in the chain of narrators, is considered to be untrustworthy.¹⁰⁰⁷ It is important to note that the *hadith* does not speak explicitly about leaving Islam or ‘the Muslim religion’. The statement ‘whoever leaves his religion’ is neutral. Some scholars believe, therefore, that the Prophet speaks in general about believers leaving their faith, whatever their religion.¹⁰⁰⁸ According to this interpretation, however, a Christian or a Jew who leaves his religion in order to become a Muslim would have to be killed. This, of course, contradicts the fundamental teachings of Islam that encourages all non-Muslims to accept Islam.¹⁰⁰⁹ Some scholars hold that the *hadith* must be referring only to Muslims who leave Islam.¹⁰¹⁰ This interpretation, however, is not fully convincing, since the Prophet did not specify that the *hadith* refers to Muslim converts. Either way, since the trustworthiness of its narrator Ikrima has been refuted by many different contemporary Islamic scholars,¹⁰¹¹ the *hadith* does not provide sufficiently strong evidence to legitimise the death penalty for apostasy. This is especially true, since in many verses the Qur'an warns against killing a person unjustly. Surah 5:32, for example, states that killing one person unjustly is like killing all mankind.

Another *hadith* used as a justification for the punishment of apostasy states that a Muslim who ‘abandoned his religion and leaves his society’ will be free, in other words, he is to be

¹⁰⁰⁵ Ahmad Abdul Rahman al-Banna *Minhat al-Maabud fi Tartib Musnad al-Tayalisi Abi Dawud* (1980) vol 1 at 296.

¹⁰⁰⁶ *Sunan al-Nasa'i* (2005) vol 7 at 103.

¹⁰⁰⁷ Al-Ashmawy op cit note 409.

¹⁰⁰⁸ Ali Bin Gared al-Enzi *Araa Ibn Hazm al-Zahreri fi al-Tafsir* (1423AH) 110.

¹⁰⁰⁹ Surah 3:64.

¹⁰¹⁰ Al-Enzi op cit note 1008.

¹⁰¹¹ Al-Banna op cit note 52 at 103–104.

killed.¹⁰¹² Hence, this *hadith* speaks about Muslims who change their religion and leave the Muslim society. Abu Bakr used the above *hadith* to justify his killing of tens of thousands of rebellious people during the famous war of conversion (*harb al-riddah*).¹⁰¹³ The reason for the battle was that after the death of the Prophet Muhammad when Abu Bakr became his successor, many Muslims rejected his leadership and stopped paying *zakat*.¹⁰¹⁴ Abu Bakr, therefore, accused them of leaving Islam and the Muslim community and fought against them.¹⁰¹⁵ Hence, the people had not just abandoned their faith, but they had engaged in a war against the Muslim caliph. The *hadith* calls them *al-murtadin al-muharibin* (those who wage war). They died as fighters against Islam and the Muslim community, and not just for leaving Islam. Consequently the *hadith* does not justify killing apostates.

Another *hadith* used to justify the death penalty for apostasy is the one that speaks about an incident during the time of the Prophet Muhammad when some people, who previously had embraced Islam, stole the Prophet's camels and killed the shepherds. The *hadith* reports that the Prophet punished them by ordering their hands and feet to be cut, and their eyes to be branded with heated pieces of iron. It is important to note that there were different kinds of crimes involved. The *hadith* states: 'Those people committed theft, murder, became disbelievers after embracing Islam and fought against Allah and His Messenger.'¹⁰¹⁶ Consequently, the aforementioned *hadith* does not specify whether or which of the penalties were assigned for leaving Islam. The *hadith* is therefore not a strong enough evidence to justify the death sentence for apostasy.

On the other hand, there is a *hadith* that recounts that a Bedouin man who had converted to Islam wanted to leave it when he fell ill with a fever. The *hadith* reports that the man came repeatedly to the Prophet Muhammad to ask him to release him from his oath of allegiance, but the Prophet refused. Notably, the Prophet did not kill the apostate; he just refused to cancel the oath until the Bedouin eventually walked away. The Prophet did not even get angry with him, quite the contrary, for although he did not approve of the Bedouin's decision, he described his departure as a positive elimination of an impurity that 'purifies what is good'.¹⁰¹⁷

Remarkably, there is no *hadith* that reports that the Prophet ever had anyone killed for leaving Islam. In all cases in which someone was killed after having left Islam, it was rather

¹⁰¹² *Sunan al-Nisa'i* (2005) *hadith* 4003, 4006.

¹⁰¹³ Ibn Jarir al-Tabari *Tarikh al-Rusul wal Muluk* (1968) vol 3 at 249.

¹⁰¹⁴ *Zakat* is one of the five pillars of Islam, and is referring to charity.

¹⁰¹⁵ Al-Tabari op cit note 1013.

¹⁰¹⁶ *Sahih al-Bukhari* (1999) vol 1 at 178–9 *hadith* 233.

¹⁰¹⁷ *Sahih Muslim* (2007) vol 3 at 530 *hadith* 3355.

for political reasons, or for leaving the Muslim society and for fighting against the Muslim community.

From all the above information, it can be seen that the *Sunnah* does not provide sufficient evidence to justify the death penalty for apostasy that has been assigned by Islamic jurisprudence. Even though there is a great deal of evidence in the Qur'an and the correct *Sunnah* that declares that apostasy is a sin against Allah punished by Allah in the afterlife, no specific punishment for apostasy in this life can be found in the Qur'an or in the correct *Sunnah*.

As the crime of apostasy has no punishment required in the Qur'an or in the correct *Sunnah*, it is argued here that there should be no punishment whatsoever for leaving Islam, and the crime of apostasy should not be treated as a *hadd* crime. The Hanafi school also suggests this. After all, both the Qur'an and *Sunnah* contain many instances in which it is shown how *Shariah* protects freedom of religion, of thought and expression. Surah 2:256, for example, states that there is no compulsion in religion. Even freedom to disbelieve is explicitly granted by the Qur'an: 'Let him who will believe, and let him who will, reject (it)' (Surah 18:29).

ii. Public flogging for drinking alcohol

For the consumption of alcohol, Islamic jurisprudence has assigned an eighty lash public flogging. This has, however, no legal justification in the Qur'an or correct *Sunnah*. Islamic jurists base the punishment on two contradicting *ahadith*. One of them speaks about 40 lashes, the other one about 80.¹⁰¹⁸ Further, a *hadith* narrated by Anas Ibn Malik states that the Prophet Muhammad had prescribed 'forty stripes with two lashes' and Abu Bakr and Umar had prescribed 80 lashes.¹⁰¹⁹

In contrast and in contradiction to the aforementioned *hadith*, a correct *hadith* quotes Muhammad's cousin, Ali the fourth caliph. This states explicitly that no punishment has been assigned 'for the drunk'.¹⁰²⁰ Abdullah al-Shirqawi also denied that there was a punishment for drinking, and refuted the claim that the Prophet's companions (*ijma al-sahaba*) mutually agreed that the appropriate punishment should be flogging.¹⁰²¹

¹⁰¹⁸ According to *Sahih Muslim* the Prophet and Abu Bakr ordered that 40 lashes be given and Umar ordered that 80 be given. *Sahih Muslim* (2007) vol 4 ch 8 at 482–4 *hadith* 4454, 4457; Al-Fawzan op cit note 248.

¹⁰¹⁹ *Sahih Muslim* bk 17 *hadith* 4226.

¹⁰²⁰ *Sahih al-Bukhari* (1997) vol 8 at 405 *hadith* 6778.

¹⁰²¹ Abdullah al-Shirqawi *Al-Tatawor Ruh al-Shariah* (1996) 215.

Since there is no justification for the punishment of flogging for drinking alcohol in the Qur'an or the correct *Sunnah*, while the *Sunnah* provides strong evidence to refute the punishment of flogging, it is argued that drinking alcohol or being drunk should not be considered a *hadd* crime. It would even be legitimate to argue that there should be no punishment for drinking alcohol whatsoever.¹⁰²²

However, Muslim society, generally, and more so the conservatives within it, would never tolerate the legitimisation of alcohol and its consumption. The rejection of alcohol is a widely recognised moral value in a Muslim community and the prohibition of drinking is very common and deeply rooted in Muslim culture.¹⁰²³ Drinking alcohol is viewed as a behaviour that damages not only the health, but also more importantly the dignity and morality of a person.¹⁰²⁴ It is also believed to cause a person to lose the respect in his Muslim community. Drinking alcohol is viewed as a source of all kinds of evil that easily can lead to abuse in the family and other crimes related to substance abuse.¹⁰²⁵ *Shariah* declares that one of its aims is the protection of peace, health and security of the community and warns that alcohol can cause a 'befogged mind' and lead to immoral behaviour.¹⁰²⁶ In a Muslim society drinking alcohol can therefore be considered a disturbance of public decency.

Since the legalisation of alcohol and its consumption would never be tolerated in a Muslim society, especially by conservative Muslims, this thesis suggest that it should be treated as a *ta'zir* crime to give the judge the possibility of exercising his discretion, to consider all aspects of the crime and to choose the right punishment from a specific range of punishments that needs to be defined.

A comparison of the prescriptions pertinent to alcohol in the penal codes of Egypt and Oman as two representative Muslim countries that do not practice *hudud* ordinances shows that there are major differences in how the matter is dealt with. The Egyptian law on drinking alcohol, for example, distinguishes between the offence of drinking or serving alcohol and the one of getting drunk in public.¹⁰²⁷ It bans drinking or serving alcohol in public places except in hotels and tourist facilities (art 2) and sentences offenders to prison time of not more than six months and/or a fine of 200 Egyptian Pounds (art 5).¹⁰²⁸ Surprisingly, the prison sentence for getting drunk in public is not higher, and the fine is even less: prison time is set at not less

¹⁰²² Muhammad Bin Ismail Al-San'aani *Subul al-Salam al-Muwselah ela Belug al-Muram* (1997) vol 4 at 30.

¹⁰²³ Saad al-Din Massad al-Hilali *Al-Tansiel al-Sharei lel-Khame wa al-Mughaderat* (2001) 30.

¹⁰²⁴ Ibid.

¹⁰²⁵ Ibid.

¹⁰²⁶ Ismail al-Jevri 'Al-ejaz al-tashreiy fi tahream al-khamr' *Jameat al-Eman* 27 January 2013, available at http://www.jameataleman.org/main/articles.aspx?article_no=1768, accessed on 25 January 2016.

¹⁰²⁷ Egyptian Law of Drinking Alcohol, no 63, 1 August 1976.

¹⁰²⁸ Ibid.

than two weeks and no more than six months, and the fine not less than 20 Egyptian pounds and not more than 100 Egyptian pounds. Even for repeat offenders the sentence it is the same, namely, jail time of no more than six months (art 7).¹⁰²⁹

The criminal law of Oman, on the other hand, does not distinguish between drinking alcohol and getting drunk. For both offences, jail time is not less than 10 days and no more than one year and/or fine (art 228).¹⁰³⁰ The production, importation and selling of alcohol are viewed as being more serious, thus these activities accrue higher sentences of jail time, namely not less than six months and not more than three 3 years and/or a fine.¹⁰³¹ Both countries do not distinguish between Muslims and non-Muslims regarding the consumption of alcohol.

Any attempt to define a specific penalty range for the *ta'zir* punishment will therefore have to define whether punishment is to be assigned only for getting drunk or for drinking alcohol without getting drunk. Further, it needs to be specified whether only drinking in public should be outlawed or any kind of drinking, even in private homes, and how hotels and tourist facilities should be treated.

As previously mentioned, there is no Islamic legal justification to treat the consumption of alcohol with *hudud* punishment. A legal justification for the ban on drinking alcohol in Muslim communities can be seen, however, in the fact that it constitutes a public disturbance. If the prevention of public disturbance is the main purpose for criminalising alcohol consumption, it can logically be concluded that only the consumption of alcohol in public should be criminalised. It is further argued that a drunk person can constitute a risk to the public safety and that someone who is drunk should deserve a more severe sentence than does drinking without being drunk.

For a person who is convicted for the first time of drinking in public without being drunk, a warning can be sufficient to correct the wrongful behaviour and to prevent a repetition of the offence. It is argued, therefore, that in this case a fine and a suspended prison sentence will be appropriate and sufficient. However, if the same person is convicted again, it can be argued that he/she has proven not to be willing to change his/her behaviour and that he/she is likely to commit the offence again. In cases of recidivism, then, the punishment for repeat

¹⁰²⁹ Ibid.

¹⁰³⁰ Sultanate of Oman, The Penal Procedure LAW, Royal Decree No 97/99, published in the *Official Gazette*, 15 December 1999, ed 661, vol 28, available at <http://www.icla.up.ac.za/images/un/use-of-force/asia-pacific/Oman/Penal%20Procedure%20Law%20Oman%201999.pdf>, accessed on 4 February 2016.

¹⁰³¹ Ibid.

offenders should be significantly higher than for first-time offenders. A higher fine and/or imprisonment up to six months are suggested.

For a person who is convicted for the first time of being drunk, the punishment could be a fine and a prison sentence of up to six months. If the convict is known for never having been drunk before, a fine and a suspended prison sentence can be sufficient to serve as a warning and to dissuade the person from repeating the offence.

If the offender is already addicted to alcohol, a fine by itself is very unlikely to prevent him/her from drinking again, and even a prison sentence might not be the best way to help such a person to be rehabilitated and return to society as a decent member who is able to abstain from alcohol. In such a case, medical or therapeutic assistance might be needed. For the purpose of *Shariah*, namely to serve the benefit of the Muslim community, it will be best that the judge will diligently evaluate what punishment will be really necessary to prevent the offender from repeating the offence and what will help to restore him as a decent member of the society and to prevent exaggerated penalties. This is also important to prevent criticism from the Muslim community.

iii. Stoning for adultery

The punishment of stoning to death for the crime of adultery has been assigned by Islamic jurisprudence and has no legal justification in the Qur'an or the correct *Sunnah*. It is based on weak *ahadith* and many Muslim scholars, including Sheikh Mahmoud Shaltout, Sheikh Mohammed Abu Zahra, Sheikh Yusuf al-Qaradawi, Sheikh Taha Jabir al-Alwani and Sheikh Mustafa al-Zarqa, therefore oppose the punishment.¹⁰³² It is also based on the differentiation made between the adultery of married and unmarried people that cannot be found in the Qur'an.

Some of the legal justifications used to defend the punishment of stoning have been discussed in Chapter 3, where it was pointed out that the different *ahadith* that are employed to defend the punishment of stoning for adultery are either weak or contradict the Qur'an.¹⁰³³ One of the main legal sources being used to justify the stoning is a verse known as 'the verse of the stoning' ('*ayet al-ragm*') that is believed to have once been contained in the Qur'an.¹⁰³⁴ Some scholars believe that its legal ruling is still valid, even though the verse can no longer be

¹⁰³² Adnan Ibrahim is one the scholars who denied punishments of stoning, see his sermon at the Friday prayer, published on 18 May 2013, available at <https://www.youtube.com/watch?v=FLGXw2-GYKQ>, accessed on 4 February 2016.

¹⁰³³ *Sahih al-Bukhari* (1997) vol 8 at 420 *hadith* 6813, 6818, 6819.

¹⁰³⁴ Ibn Qudamah op cit note 648 at 433.

found.¹⁰³⁵ The famous, though weak, *hadith* that says ‘Al-sheikh and al-sheikha [married man and women] if they commit *zina*, stone them as a punishment from Allah’¹⁰³⁶ is believed to refer to the verse of the stoning mentioned above. Those scholars who believe that the alleged verse has existed in the Qur’an employ two different *ahadith* to explain how it got lost. One of these *ahadith* reports that the verse simply got lost during the time of the collection and writing the Qur’an.¹⁰³⁷ The other reports that the paper on which the verse was written was eaten by a sheep.¹⁰³⁸

This theory of the alleged verse of the stoning that claims that it got lost but is still valid is very weak, and this is not only because the two *ahadith* that explain the disappearance of the verse are weak, but especially because the Qur’an declares in Surah 15:9 that Allah guards over His word to protect it from any error or corruption. It is therefore illogical to believe that Allah would allow such an important verse to ‘accidentally’ disappear from the Qur’an.

Scholars who defend the punishment of stoning also point to the following two *ahadith* both of which are weak, since they are reported in different, contradictory versions and contradict the provisions of the Qur’an.¹⁰³⁹ The first one of them reports a case of adultery between a married woman and an unmarried man. Interestingly, the Prophet Muhammad stressed that he would judge the case according to the book of Allah, but then he ordered that the woman to be stoned, even though the Qur’an does not provide any justification for punishment by stoning. The *hadith*, thus, is quite illogical, and it does not provide strong enough evidence to justify stoning, particularly since its authenticity is weak.¹⁰⁴⁰

Another *hadith* that is used to support stoning as the punishment for adultery contains a report of monkeys, who allegedly stoned another monkey for having committed adultery.¹⁰⁴¹ This report, narrated by Amr Ibn Maimun, is a weak *hadith* and completely contradicts common sense, for it is illogical to use the behaviour of animals as a moral example, much less as a legal justification for a death penalty.

The most famous *ahadith* used to justify stoning as punishment give accounts of two stonings ordered by the Prophet Muhammad. According to one of them, a man named Ma’iz (or Mu’az) was stoned by order of the Prophet Muhammad after having confessed that he had

¹⁰³⁵ Salih Bin al-Fauzan ‘Had al-rajm fi al-zena thabet bel kitab wal Sunnah wal ijma’ *Al-Fawzan* 21 March 2015, available at <http://www.alfawzan.af.org.sa/node/15335>, accessed on 4 February 2016.

¹⁰³⁶ *Sunan al-Nisa’i* (2007) vol 4 *hadith* 273.

¹⁰³⁷ Ibid.

¹⁰³⁸ *Sunan Ibn Majah* (2007) 111–12 *hadith* 1944.

¹⁰³⁹ Sankur op cit note 427; Buhindi op cit note 427.

¹⁰⁴⁰ *Sunan at-Tirmidhi* op cit note 433.

¹⁰⁴¹ Ibn Hajar al-Asqalani op cit note 434 at vol 7 at 335 *hadith* 3849.

committed adultery. This *hadith*, however, is a weak one since one of its narrators, Ikrimah, is not considered to be trustworthy.¹⁰⁴²

The other famous *hadith* reports the case of a woman, known as the Gamidi woman,¹⁰⁴³ who was stoned by order of the Prophet Muhammad after having confessed that she had committed adultery and that she was pregnant. According to the *hadith*, the Prophet Muhammad gave her the opportunity to give birth, nurse and wean her baby before he gave the order for her to be stoned. Many scholars, including Taha Jabir al-Alwani, do not accept this *hadith* as a proof of stoning as the punishment for adultery. They believe that, in ordering the stoning of the Gamidi woman, the Prophet Muhammad did not practice Islamic law, but '*shara man qablana*', ie the 'law of the people before us [the Muslims]', namely Jewish law that in the book of Deuteronomy imposes stoning.¹⁰⁴⁴ Scholars explain that he did this since the qur'anic verse that assigns a punishment for adultery had not yet been revealed.¹⁰⁴⁵ In other words, at that time no Islamic ruling existed concerning the punishment for adultery. The scholars who hold this view, point out that after that incident the Prophet never practiced this punishment again.

In contrast to the aforementioned example, where the Prophet Muhammad applied Jewish law for lack of a relevant Islamic legal ruling, he also occasionally applied Jewish law when judging Jews. The fact that the Prophet Muhammad used to judge the Jews according to their own law, the Torah, is demonstrated clearly in a *hadith* that recounts an earlier incident in which an unmarried Jewish man and an unmarried Jewish woman were brought to the Prophet Muhammad on a charge of committing sexual intercourse.¹⁰⁴⁶ The *hadith* reports that the Prophet asked them about the legal punishment for adultery according to the Jewish Torah. After they had read the relevant verse in the Torah, namely the verse of the *Rajm* (stoning to death), the Prophet ordered that they be stoned to death.¹⁰⁴⁷

Further proof of the inappropriateness of stoning to death as a punishment is the fact that Muatazila and Khawarig, two early Muslim groups that were established in the first century AH and had considerable influence on Islamic theology, completely opposed the punishment of stoning.¹⁰⁴⁸ They pointed out that stoning was used in the first days of Islam only, when the

¹⁰⁴² *Sahih al-Bukhari* (1997) vol 8 at 426 *hadith* 6824.

¹⁰⁴³ Anas Ibn Malik *Muwatta Malik* (1985) 819.

¹⁰⁴⁴ The Bible, Deuteronomy 21:18–21.

¹⁰⁴⁵ Taha Jaber al-Alwani 'Lerajm fi al-Qur'an' *Alwani's personal website* 23 October 2014, available at <http://www.alwani.net/الراجمفيالقران/الراجمفيالقران/الراجمفيالقران/الراجمفيالقران/item/547-الراجمفيالقران.html>, accessed on 4 February 2016.

¹⁰⁴⁶ *Sahih al-Bukhari* (1997) vol 8 at 423 *hadith* 6819.

¹⁰⁴⁷ Ibid.

¹⁰⁴⁸ Al-Jaziri op cit note 190 vol 5 at 65.

Prophet Muhammad ordered that kind of punishment in imitation of the Jewish Torah. They explained that when the verse that assigns flogging for adultery (Surah 24:2) was revealed, the use of stoning was abrogated, and is therefore no longer applicable.

The majority of the scholars¹⁰⁴⁹ of the four Muslim Sunni schools, however, counter this argument and defend the stoning, pointing to a *hadith* of Abu Hurairah, according to which the Prophet Muhammad himself had carried out the punishment of stoning. The scholars who hold this opinion believe that the *hadith* of Abu Hurairah overrides the qur'anic verse that assigns flogging as punishment.¹⁰⁵⁰ Muatazila and Khawarig, however, refute this opinion and point out that the qur'anic verse that assigns flogging was revealed in the year 5 or 6 AH and that Abu Hurairah converted to Islam only later, namely after the year 7 AH. They conclude that the *hadith* of Abu Hurairah that reports that the Prophet Muhammad himself had carried out the punishment of stoning can therefore not be correct.¹⁰⁵¹

In summary, it can be concluded that the legal justifications used to defend the punishment of stoning to death for adultery are all too weak to justify such a severe penalty. At the same time there are strong arguments against the punishment.

Due to all the above-mentioned evidence, many Muslim scholars oppose the punishment of stoning. Among them are the Egyptian Sheikh Muhammad Abu Zahra,¹⁰⁵² and the Lebanese Sheikh Abdullah al-Alayli,¹⁰⁵³ who point out that all the *ahadith* used as its legal justification are weak. Sheikh Mustafa al-Zarqa opposed treating the punishment of stoning as a fixed or *hadd* punishment and advocated treating it as a *ta'zir* crime, leaving it up to the imam or judge to enforce the punishment or disregard it. Sheikh Yusuf al-Qaradawi shares this opinion.¹⁰⁵⁴ Muhammad Abu al-Qasim Haj Ahmad views the punishment of stoning as a plot devised by the Jews and aimed at destroying the message and legacy of the Prophet Muhammad, which aims to take the burdens from people and to show mercy.¹⁰⁵⁵

As seen above, there is no agreement on this issue among the Islamic scholars. This casts doubt on the validity of stoning as a punishment and thus can be used as an argument against its application. In fact, when there is any uncertainty — as is the case here — the imposition of the punishment should be avoided. In the light of the above, it can be concluded and argued with confidence that the punishment of stoning for adultery should not be practiced at all.

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Ibid.

¹⁰⁵² Muhammad al-Ghazali *Distur al-Wihda Athakafiyah* (1997) 86.

¹⁰⁵³ Al-Alayli op cit note 954 at 81.

¹⁰⁵⁴ Mustafa al-Zarqa *Fatawa al-Zarqa* (2010) 394.

¹⁰⁵⁵ Muhammad Abu al-Qasim Haj Ahmad *Jadaliyat al-Ghayib wa 'al-Inthan wa al-Tabiyah al-Aalamiyah al-Thaniyah* (2004) vol 1 at 64.

The punishment for adultery that has been assigned in the Qur'an, namely a flogging with 100 lashes, will be discussed separately in the following section.

(b) *Hudud* punishments prescribed by the Qur'an

This section focuses on the *hudud* prescriptions that are based on 'definite texts' and can thus be considered to be 'definite provisions', since they are assigned by the Qur'an. These are the flogging for adultery and defamation, amputation for theft, and execution, or crucifixion, or amputation, or exile for *haraba*.

While theft is considered a crime also by international laws, the crimes of adultery and defamation for illicit sexual behaviour are not or no longer criminalised by many national laws and are considered by many to be outdated. Many moderate Muslim scholars, including Ziba Mir Hosseini,¹⁰⁵⁶ appeal, therefore, that they no longer be criminalised. Averting the *hadd* punishment for adultery, fornication and defamation could indeed be justified by the principle of doubt. Here it is argued, however, that since these crimes are defined as such by the Qur'an, an appeal to legalise them would be viewed as an assault on the Qur'an and on Islamic identity. Further, it is important to note that the crimes of adultery and defamation aim to protect marriage and family, both being a crucial pillar and core values in any Muslim society. Legalising adultery would, therefore, be also considered an assault on the Muslim society. Since this thesis is committed to remain loyal to *Shariah* and to build a bridge rather than to attack or demolish Islamic culture, it does not suggest ignoring or abolishing the crimes of adultery and defamation, but develops suggestions for alternative punishments that are compatible with international human rights laws and that serve the Muslim community by protecting their human rights and the reputation of Muslims.

i. Flogging (and one year exile) for adultery (and fornication)

The traditional definition of the crime of *zina* is 'sexual intercourse of a man with a woman who is not his wife, or sexual intercourse of a woman with a man who is not her husband' (see Chapter 2).¹⁰⁵⁷ As previously mentioned, Islamic jurisprudence differentiates between the act of adultery between married and unmarried people.¹⁰⁵⁸ Islamic scholars usually speak of

¹⁰⁵⁶ Ziba Mir Hosseini 'Criminalizing sexuality: Zina laws as violence against women in muslim contexts' *ZibaMirHosseini.com* March 2010 at 16, available at <http://www.zibamirhosseini.com/documents/mir-hosseini-article-criminalizing-sexuality.pdf>, accessed on 11 May 2016.

¹⁰⁵⁷ Ibn Hajar al-Asqalani op cit note 556; Jumah op cit note 223 at 140.

¹⁰⁵⁸ Al-Hin, Al-Bugha & Al-Shurbagy op cit note 520 at 56.

‘adultery’ when referring to extra-marital sex between married persons, and of ‘fornication’ when referring to sexual intercourse between those who are not married. It is important to note that such a differentiation cannot be found in the Qur'an. The punishment of stoning to death assigned by Islamic jurisprudence for married adulterers has been already discussed and refuted. For unmarried people convicted of illicit sexual intercourse, Islamic jurisprudence assigns the punishment of flogging with 100 lashes and exile of one year.¹⁰⁵⁹ The year in exile is usually applied as a jail term.¹⁰⁶⁰ The Qur'an imposes the punishment of a flogging with 100 lashes for the crime of *zina*, regardless of whether it has been committed by married or unmarried persons.¹⁰⁶¹ Whilst the flogging with 100 lashes assigned by Islamic jurisprudence corresponds to the punishment prescribed in the Qur'an, a penalty of exile for one year is not found in the Qur'an. Its prescription is based on the *Sunnah*.¹⁰⁶²

The reason for the assignment of the harsh punishment of flogging can be understood when considering that adultery violates the family and its honour that can be considered the heart and main pillar of Muslim society. The prohibition of *zina* is aimed at protecting marriage, children, the honour and reputation of the woman's family, but also public decency and health.¹⁰⁶³ It is aimed at preventing out of wedlock pregnancies, venereal diseases, illegitimate children, injustice in inheritance and depriving children of the honour of claiming genuine paternity.¹⁰⁶⁴ Thus, it is designed to protect the dignity, morality and ethics of the people, as well as the stability of the family. From an Islamic perspective, extra-marital sexual relations are considered to be a serious violation of the normative principles of society, its social, religious, moral and legal norms and to demoralise the social order.¹⁰⁶⁵

While the importance of the protection of family explains why a harsh punishment has been assigned, it does not justify it. Flogging is one of the kinds of harsh and cruel punishments that is not compatible with international human rights standards and harms the reputation of Islam and the Muslim community worldwide. It also does not fit in with the reality of life in the twenty-first century. Furthermore, the method of carrying out the punishments in public is very humiliating and thus violates human dignity. It therefore can be argued that the reality of life in the twenty-first century requires that the punishment is adapted in a way so that it fits in with more modern forms of punishment.

¹⁰⁵⁹ Ibn al-Arabi *Ahkam al-Quran* (2003) 517.

¹⁰⁶⁰ Al-Hanafī op cit note 530 at 63.

¹⁰⁶¹ Ibid.

¹⁰⁶² *Sahih Muslim* (2007) vol 4 at 461 *hadith* 4414.

¹⁰⁶³ Okon op cit note 67 at 230.

¹⁰⁶⁴ Ibid.

¹⁰⁶⁵ Ibid.

Even though the Qur'an does not differentiate between the adultery of married persons and illicit sexual intercourse of unmarried persons, the approach of Islamic jurisprudence to do so is somehow understandable, since the two offences differ in terms of their severity. The adultery of two married persons is seen as bringing harm and shame to two entire families, particularly if the two persons involved have children, and thus it is seen as being more serious.¹⁰⁶⁶ It cannot be compared, for example, with unlawful sexual relations between two unmarried people, particularly if they are engaged to each other and about to get married.

Consensual relations between two unmarried people are not even considered a crime in many countries, including in rather liberal moderate Muslim countries like, for example, Tunisia. In other Muslim societies, by contrast, such illicit, albeit consensual, intercourse can be considered to constitute a disturbance of public decency once the offence is exposed. Its severity, though, depends on the cultural environment in which it takes place, and can differ from a country to another. In many Muslim countries, the aspect of honour plays a very important role that must not be underestimated. In some moderate Muslim countries like Egypt or Jordan, where *hudud* ordinances are not applied, the offence is still criminalised due to the concept of honour and public decency. In these countries a fine and/or jail sentences is usually assigned.¹⁰⁶⁷ For conservative Muslim countries, for example, like Saudi Arabia, where *hudud* ordinances are practiced, legalising sexual intercourse of unmarried people is unacceptable for both religious and cultural reason. It is viewed as a punishable *hadd* crime, as a public disturbance, and causing damage to the reputation of the involved families.¹⁰⁶⁸ The fact that because of unlawful sexual intercourse of unmarried people, a child could be born out of wedlock is another major reason why the action is considered a serious crime. A child born out of wedlock will be seen as a tremendous shame for the family, one that can affect the future of the child and its reputation adversely, and can also cause problems concerning inheritance. Even though today many countries have laws that ensure that children born out of wedlock receive protection, and that — especially — they inherit equally in relation to their siblings born within wedlock, this is usually not the case in conservative Muslim countries, where children born out of wedlock suffer negative consequences.

It is argued here that treating *zina* by a *ta'zir* punishment, enables the judge to take all the above mentioned differences into consideration and to assign a penalty that considers the

¹⁰⁶⁶ Al-Zahrani, Yahya Ibn Moosa 'Mafased wa khuturat Al-zena' 12 August 2016 available at http://www.denana.com/main/articles.aspx?selected_article_no=6094, accessed on 11 August 2016.

¹⁰⁶⁷ Egyptian Penal Code as amended by law no 95 of 2003 art 278; Jordanian Penal Code no 16 of 1960 arts 282 & 283.

¹⁰⁶⁸ Al-Otaibi op cit note 47 at 11.

severity of the offence, the cultural environment, and the individual circumstances. This serves justice and thus can contribute to a growing public acceptance of the penalty, and will help to protect the image of Islam. It is argued, therefore, that the principle of reality requires treating the crime of *zina* as a *ta'zir* crime.

As a matter of fact, even in Muslim countries that apply *hudud* ordinances, adultery is anyway often treated as a *ta'zir* punishment. This is on account of the difficult requirements for a conviction for the crime of adultery, namely, the need to have four eyewitnesses, or the confession of the suspect, or clear evidence, such as pregnancy. To provide four eyewitnesses, who have seen the actual penetration is almost impossible, and it is very unlikely that a suspect will confess to his crime — even if he did, he could withdraw his confession easily. This means that pregnancy would be almost the only way to prove that an offence has been committed. These strict requirements make it quite difficult to prove the *hadd* crime of adultery; and if the offence cannot be proven without any doubt, it will automatically be treated as a *ta'zir* crime. If a case is treated as a *ta'zir* crime, the requirements are different and it is much easier to convict offenders. Consequently, it can be argued that, also for practical reasons, it will be best to treat the crime as *ta'zir*.

Treating *zina* by a *ta'zir* punishment can also help avoiding different cases of gender discrimination that arise from the application of the *hadd* punishment. One of these cases of gender discrimination arises, for example, if a man and a woman are caught in adultery and if the man does not confess his 'sin', but that the woman is convicted by pregnancy. In such a case only the woman will be subject to punishment. This is unjust and discriminatory. Similar cases of discrimination and injustice arise from the said prescription in cases of rape, when a woman accuses a man of rape, but fails to prove her case by providing four eyewitnesses. If the man denies the rape, she is punished and he is not. So a raped woman, in fact, is treated as a perpetrator and not a victim of a terrible crime. All these difficulties, including the risk of miscarriage of justice and discrimination that can result from the *hadd* prescriptions, can and should be avoided by treating the crime of *zina* by *taz'ir* punishment.

It is suggested, here, that the traditional corporal *zina* punishments should be replaced by assigning admonition and/or community service and/or a fine. This sort of punishment is supposed to be sufficient to prevent a repeat of the offence, and an appropriate recompense for the harm for the families and the community and/or the public disturbance. Further, the suggested punishment is more appropriate than a jail sentence, which would remove a breadwinner or caretaker from the family and would thus impact negatively on the dependants, if either person has children or dependants.

If the woman falls pregnant as a result of the act of *zina*, it is suggested that the man should marry her to prevent the aforementioned negative results from arising. If he marries her, it is argued that there should be no further punishment. This is how most moderate Muslim countries handle such cases. If, however, the man refuses to marry the woman whom he is said to have defiled, he should be made responsible to pay maintenance — at least for the child, if not for the woman also.

In view of the problem of honour killings in Muslim countries, it could be argued that long prison sentences should be assigned for even acts of consensual sexual intercourse between unmarried people in order to prevent the woman's family from taking action. On the other hand, however, it can be argued that even a long prison sentence is very unlikely to change the mind of family members who believe in honour killings and, therefore, this aspect should not influence or dictate the sentence for the crime of *zina*. (The problem of honour killings that can be considered part of customary law needs to be addressed on its own at a different level, for example, by criminalising it and treating it as a regular murder with an appropriate sentence, not a lower one, as is often the case. A real change in this custom is achievable only in the long term through education and a change of mindset.)

Concerning the crime of rape, it is argued that the crime brings tremendous harm to the victim and her family and, consequently, a severe punishment is necessary to bring justice and to prevent the offender from committing the crime again. The aspect of deterrence is especially important, since the crime of rape is often very hard to prove. The victim is thus left in a very vulnerable position and deserves protection from the government. A prison sentence of ten to fifteen years is suggested, with the option to extend the sentence indefinitely if there are doubts concerning the rehabilitation of the offender. The prison sentence can be combined with a fine. It might be necessary for the punishment to include specific therapy for the offender. Rape also falls under the crime of *haraba*. The punishment, though, is the same in both cases.

ii. Flogging for defamation (*qazf*)

The punishment of flogging with 80 lashes as punishment for defamation, ie launching false accusations of illicit sexual intercourse, is based on a definite text, namely on Surah 24:4: 'And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations) — flog them with eighty stripes.' It is important to note that this qur'anic verse explicitly aims to protect women from being falsely accused of illicit sexual behaviour. Obviously, the Qur'an did not see the need to protect men from such defamation.

Islamic jurists, however, have extended the definition of the crime in a way to protect men also from false accusations of illicit sexual behaviour.¹⁰⁶⁹ This extended definition can be seen as one of the key factors that have led to the paradoxical situation that the verse is often misused in a way to cause the false conviction of innocent women, instead of protecting them from a miscarriage of justice. In several Muslim countries, including Pakistan, the aforementioned verse is often used against victims of rape, placing the onus of proof on the woman who, in seeking justice, accuses her offender. Hence, she will have to provide four eyewitnesses to prove her case. Since this is usually impossible, she fails to prove her case and, therefore, often ends up being punished for the crime of defamation and/or adultery.

Such abuse can actually be seen as a violation of the qur'anic prescription concerning defamation that aims to protect women from miscarriages of justice. The prevention of such injustice should therefore be paramount, and the protection of women from miscarriages of justice should remain the main focus. There is insufficient justification to extend the definition of the crime in a way to also include the protection of men from defamation of illicit sexual intercourse, while the Qur'an obviously did not see the need to do so. Even though it could be argued that it would seem fair and serve gender equality to treat men and women in the same way, it is important to note that in those countries where *hudud* punishment are practiced, women are usually discriminated against in many ways, while for men there is no obvious need to be protected from discrimination, defamation or a miscarriage of justice. It is argued, therefore, that the misuse of the verse of defamation has to be prevented by all means. The high importance that the Qur'an places on the protection of the reputation, honour and security of women and the importance of protecting them from miscarriages of justice can be seen in the harshness of the punishment assigned for violations against them. In order to prevent its misuse, the qur'anic verse on defamation should never be used against women, much less in cases that they report cases of rape. It should be used only in the way designed by the Qur'an, namely to protect women.

Since the traditional *hadd* punishment of flogging is very harsh and cruel and thus in conflict with international human rights standards, it is argued here that it will be more beneficial for Muslim society to apply instead a kind of punishment that will fit better with international laws of human rights. An appropriate alternative punishment would be a prison sentence up to one year and/or fine to be imposed at the discretion of the judge. The suggested punishment is appropriate to restore justice, has a deterrent effect, and can serve the

¹⁰⁶⁹ Al-Hin, Al-Bugha & Al-Shurbagy op cit note 520 at vol 8 at 82.

rehabilitation of the offender. The punishment thus serves the purposes of *Shariah*, namely by serving society and restoring the honour and dignity of victims and their families.

iii. Amputation for theft

The punishment for the crime of theft assigned by Islamic jurisprudence is the amputation of the hand(s) for first time offenders, and further amputations of limbs and jail sentences for repeat offenders.¹⁰⁷⁰ The punishments for repeat offenders, though, have no justification in the Qur'an, and even the qur'anic verse (Surah 5:38), on which the amputation of hand(s) is based, is not fully clear and does not necessarily refer to a physical amputation of the hand. It is important to note that the qur'anic text in Arabic states that the punishment is to 'cut the hand'; it does not speak of 'cutting off' the hand(s), as it appears in most English translations:

NOW AS FOR the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God: for God is almighty, wise. (Surah 5:38 Asad translation)

The wording 'cut the hand' could as well refer to just inflicting an injury to the hand, or it could even have a metaphorical meaning, referring to stopping the hand of the thief from reaching the money or the property of the people.¹⁰⁷¹ This could be achieved for example, by isolating the thief from the society by putting him in jail. An examination of the use of the term cutting/cut off (*qat'a*) in the sacred texts shows that it is repeated 32 times throughout the Qur'an and that twenty-seven out of those 32 times it is used metaphorically rather than literally,¹⁰⁷² for example, referring to 'cut off ties of kinship',¹⁰⁷³ or to 'cut off the way'.¹⁰⁷⁴

The clearest example that supports its meaning as inflicting injury is a verse that speaks of women who accidentally injured themselves (cut their hands) with the knives they held in their hands:

And when the women saw him, they were greatly amazed at his beauty, and [so flustered were they that] they cut their hands [with their knives], exclaiming, "God save us! This is no mortal man! This is nought but a noble angel!" (Surah 12:31 Asad translation)

Since this verse also speaks about cutting hands, whilst obviously not in the meaning of amputation, it is often used to argue that the punishment for theft assigned by the Qur'an does not necessarily refer to the actual amputation of hand(s), but just to inflicting an injury to the

¹⁰⁷⁰ For details see Chapter 4.

¹⁰⁷¹ Shahrur op cit note 244.

¹⁰⁷² Ibid.

¹⁰⁷³ Surah 47:22.

¹⁰⁷⁴ Surah 29:29 'Do ye indeed approach men, and cut off the highway?- and practise wickedness (even) in your councils?'

hand(s).¹⁰⁷⁵ Abu Bakr al-Razi for example, declared therefore: ‘The meaning of this verse is unclear; therefore it should not be used to shed blood with it.’¹⁰⁷⁶ Since the meaning of the punishment is not fully clear and causes doubt, it is argued here that the principle of doubt requires averting the punishment of amputation.

Further, also the principles of reality and necessity justify a rejection of the punishment of amputation in view of the realities of life in the twenty-first century, including the morally and religiously low standard in most countries from one side, and the commitment to international human rights laws from the other. The historical report of Umar Ibn al-Khattab, who suspended the *hadd* punishment for theft during the year of famine,¹⁰⁷⁷ serves as a good example to show that *hadd* can be averted if that is required by the reality of life. Of course, this does not mean that crimes of theft should be ignored. The protection of property is so important in any society that it is protected by all laws, including international human rights laws.

The punishment of amputation, though, is one of the cruellest punishments and one of the main reasons why Islamic law is condemned as being barbaric and backward. It is suggested, therefore, that amputations as punishment for theft should be completely rejected and replaced with imprisonment and/or a fine, depending upon the value of the stolen object — and taking all the circumstances of the offence into consideration.

Interestingly, all four schools assign the punishment of imprisonment as the last option for repeat offenders.¹⁰⁷⁸ This is interesting because usually the last option is supposed to be the harshest punishment. This argument prevents any possible claim stating that imprisonment is not harsh enough to deal with the crime of theft. Furthermore, it is interesting that all four schools agree on the punishment of imprisonment though it cannot be found in the Qur'an. Imprisonment has enough of a deterrent effect to prevent a thief from committing the crime again and is thus an effective punishment to protect property. At the same time, it complies with international human rights standards.

It is suggested that theft is treated as a *ta'zir* crime, leaving it up to the discretion of the judge to assign the appropriate jail sentence and/or fine, while taking into account the value of the stolen object and the circumstances surrounding the theft. In this way the punishment will serve the needs of justice, allow for rehabilitation and will protect the reputation of Islam.

¹⁰⁷⁵ *Tafsir al-Tabari* (2001) vol 13 at 239.

¹⁰⁷⁶ Fahr al-Din al-Razi *Maḥatib al-Ghaib* (1981) vol 6 at 55.

¹⁰⁷⁷ Ibn al-Qayyim al-Jawziyyah op cit note 36 vol 3 at 12.

¹⁰⁷⁸ Ibrahim Ibn Mohammed Ibn Ibrahim al-Halabi *Multaqa al-Abhur* (1998) vol 1 at 349; Al-Kasani op cit note 653 at 86.

iv. Execution, crucifixion, amputation or exile for *haraba*

The punishments of crucifixion, execution, amputation or exile that have been assigned for the crime of *haraba* are among the harshest and cruellest punishments of the entire set of *hudud* ordinances. They have been assigned by the Qur'an in Surah 5:33 and are thus based on a definite text. The Qur'an states:

‘The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land’ (Surah 5:33).

There is wide agreement amongst Islamic scholars that the crimes that this verse refers to include public robbery, murder, rape and all kinds of violent physical attacks against the Muslim society, its government, the public order or safety.¹⁰⁷⁹ The range of crimes that fall under ‘waging war against Allah and His Messenger’ also include acts of war against Islam and the Muslim community,¹⁰⁸⁰ which can include also terror attacks, the use of bombs, automatic guns or chemical weapons, these being crimes that were not even known at the time that Islamic jurists defined their understanding of the crime. For these kinds of crimes the law of war applies rather than criminal law.¹⁰⁸¹

The most critical and controversial aspect of the *hudud* prescriptions concerning *haraba* is that Islamic jurists have widened the definition of the crime of *haraba* in a way to refer not just to physical attacks but to include even any act or statement that can insult or bring harm to Allah or His Messenger, to Muslims or to Islam.¹⁰⁸² It is due to this extension of the definition that the harsh *haraba* punishment will no longer be limited to cases of physical attacks against a Muslim nation or its public safety, but can be used to whatever is perceived as assault on the Prophet or Islam including statements, literature or films critical of Islam.

Applying the extremely harsh and cruel *haraba* punishments for what is perceived as insulting Allah or His Messenger, but referring to non-physical actions or statements, violates international human rights laws in several ways, as demonstrated in Chapter 3. It is argued here that this extension of the definition is not justified by the Qur'an or the correct *Sunnah*.¹⁰⁸³ The *Sunnah* gives a clear picture of the real meaning of ‘fighting against Allah

¹⁰⁷⁹ Mohammed Abdullah Habayballah al-Shanqaiti *Tabyeen al-Masalek le Tadreb al-Salk* (2013) 520; Muhammad Arafa al-Disuqi *Hashiat al-Disuqi ala al-Sharh al-Kabir* (1978) vol 4 at 348; Mohammed Bin Ahmed al-Khatib al-Sherbini *Mughni al-Muhtaj ela Marefat Maani Alfaz al-Mihaj* (1994) vol 4 at 180; Mansour Bin Yunus Bin Idris al-Bahuti *Kashf al-Qenaa an Maten al-Eqna* (1983) vol 6 at 149–150.

¹⁰⁸⁰ *Tafsir Ibn Kathir* (1999) vol 3 at 96.

¹⁰⁸¹ Hamad Bin Ali al-Luhaidan *Al-Sowar al-Muaseah le-Jaremat al-Harabah* (2011) 72–157.

¹⁰⁸² Ibn Taymiyyah op cit note 381 at 421.

¹⁰⁸³ *Ibid* at 379.

and His Messenger’, namely as a physical fight against the Prophet, Islam or Muslims.¹⁰⁸⁴ One of the most famous examples is the previously mentioned *hadith* that tells of some people who turned away from the Prophet Muhammad after having heard his report of the night journey.¹⁰⁸⁵ They joined the enemy’s camp, this being the Meccan idol-worshipper tribe of Quraish, and fought against the Prophet Muhammad in the famous war of Badr, in which they were killed by the Prophet and his army ‘along with Abugahel’, the commander of the Quraish army. Thus they were killed as a result of participating in a physical struggle against the Prophet and Muslims. Hence, they died as fighters (*muharibin*). This is one of the classic examples that describe the meaning of the crime of ‘fighting against Allah and His Messenger’, namely as referring to physical attacks on the Muslim community. Other examples have been mentioned earlier in this chapter in the discussion of the crime of apostasy, where it has been pointed out that the apostates who left the Muslim community and turned against it with physical attacks, were not killed for leaving Islam (*apostasy*), but for fighting ‘against Allah and His Messenger’, thus the crime of *haraba*.

In summary, it can be said that the crime of *haraba* includes all kinds of physical attacks ‘against Allah and His Messenger’, including against Muslim society, Muslim individuals and the safety of the public, but it does not include non-physical actions such as statements critical to Islam, issued verbally or in other forms, including writings, images or movies. It is stressed, therefore, that the *haraba* punishments should never be applied in cases of non-physical actions that are perceived as assaults against Islam. It is argued, therefore, that the extremely harsh and cruel *haraba* punishments, if at all applied, should be limited to cases of physical attacks. It is argued, further, that they should actually be completely avoided, since they violate international human rights law.

It is important to note that the four different kinds of punishment meted out for the crime of *haraba* in Surah 5:33 are much debated. While the Hanafi, Shafei and Hanbali schools of jurisprudence view the four different forms of punishment as gradual and designed to suit the different levels of severity of the crime, the Maliki school believes that they are given as equal options to freely choose from. Here it is argued that the view of the Maliki school is convincing, since the verse indeed lists the different punishments as options to choose from. This is indicated by the use of ‘or’ between them: ‘execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land’.

¹⁰⁸⁴ Al-Ashmawy op cit note 409.

¹⁰⁸⁵ Imam Ahmad *Musnad al-Imam Ahmad* (2008) vol 1 at 374.

The punishment of exile, which is one of the four different options of punishment, is interpreted by the Maliki and Hanafi schools as referring to imprisonment.¹⁰⁸⁶ This interpretation makes sense and is fully compatible with international human rights laws. Since the aforementioned verse gives a judge the option to choose one of the four options of punishment, and the interpretation of exile as imprisonment fits best with international human rights standards and with the reality of the twenty-first century, it is argued, here that it is fully legitimate to apply imprisonment as a punishment in all cases of *haraba* and to completely avoid the other three options of physical punishments, including death sentences.

It is argued here that imprisonment is effective enough to deal with all kinds of crimes, and it fits with the principles of modern international laws of war, for these do not include cruel and inhuman punishments, such as crucifixions or amputations. A prison sentence is very effective in terms of deterrence and rehabilitation; it can be adjusted to fit the severity of the crime and can take into account whether the person before the judge is a first-time offender or a repeat offender who should be punished more severely. Depending on the exact crime and circumstances, the sentence can be as much as life in prison and can be combined with a fine.

Applying imprisonment as the only kind of punishment and not imposing death sentences or physical torture is also the best way to reduce the power of dictators, who tend to falsely use the verse about *haraba* to fight their opposition by labelling any oppositional activities, including demonstrations, as terrorist attacks. This is what happened, for example, on 2 January 2016, when the Saudi royal government executed 47 men, including the prominent Shi'a Muslim cleric, Sheikh Nimr Baqir al-Nimron, on terrorism-related charges.¹⁰⁸⁷ The director of the Middle East and North Africa programme at Amnesty International commented on the execution, stating that '(t)he killing of Sheikh Nimr al-Nimr in particular suggests they are also using the death penalty in the name of counter-terror to settle scores and crush dissidents'.¹⁰⁸⁸

In summary, it can be said that all the suggested amendments are in full compliance with *Shariah*, since they serve *Shariah*'s purposes and are justified by the principles of reality and necessity and the principle of doubt. The suggested punishments can serve those countries that apply *hudud* ordinances as a guideline to reform them, since all the aspects that need to

¹⁰⁸⁶ Al-Jaziri op cit note 190 vol 5 at 360.

¹⁰⁸⁷ 'Shia cleric among 47 executed by Saudi Arabia in a single day' *Amnesty International* 2 January 2016, available at <https://www.amnesty.org/en/press-releases/2016/01/shia-cleric-among-47-executed-by-saudi-arabia-in-a-single-day/>, accessed on 13 March 2016.

¹⁰⁸⁸ Ibid.

be considered, have been pointed out. Nevertheless, the suggested sentences leave enough space to consider the environment in the respective country.

V Conclusion

This chapter has demonstrated that *Shariah*, known to be flexible enough to suit all times and every environment, is indeed flexible enough to reconcile *hudud* punishment with international human rights laws. It has shown that *Shariah* has provided the necessary tools to secure the benefit of the people — its main purpose — and to overcome the seemingly insurmountable obstacle created by the fact that *hudud* ordinances are considered definite texts that are immutable. The principles of reality and necessity allow for exceptions, even from texts that are considered definite, if these are necessary and required by the reality of life to secure the benefit of the people and to protect them from harm. In addition, the principle of doubt requires that in cases of doubt the *hadd* punishment should be averted. The chapter has demonstrated that the Prophet Muhammad himself, as well as his companions and successors, applied these principles repeatedly to compromise definite prescriptions and to drop or suspend *hadd* punishments whenever this was necessary for the sake of the benefit of the people.

The understanding of what constitutes doubt and thus would justify — or even require — the suspension of *hudud* punishments is very wide and encompassing. There are, in fact, enough reasons that would justify a complete moratorium on *hudud* ordinances. This is what many moderate Muslim scholars call for. In this thesis, however, it is argued that only reforming them can bring a real long-term solution, for if they were simply set aside, they can easily re-implemented any time. A call for their abolition is also not very promising, since an appeal for their abolition is very likely to be completely rejected as an assault on the Islamic identity.

This thesis does not suggest changing or putting aside any of the qur'anic definite texts. It instead calls for a return to the core values of the Qu'ran's teachings and a focus on the purpose of *Shariah*, namely to serve the benefit of the people and to protect them from harm. All the suggestions presented in this chapter ensure compliance with international human rights standards. They have been developed in a religiously sensitive manner and in full compliance with *Shariah*. They focus on the core values of *Shariah* and clear the *hudud* punishment as developed by Islamic jurisprudence from inappropriate interpretations that contradict these core values. All the suggested amendments serve *Shariah's* purposes and are

justified by the principles of reality and necessity and the principle of doubt.

Since the suggestions to reform *hudud* punishment as presented in this chapter have been developed in full compliance with *Shariah*, they are supposed to be acceptable to even conservative Muslims. Thus, they can help to build a bridge between the conservative Muslim countries that view Allah as the highest authority, and that part of the world that hold human rights and human dignity as the highest values and guideline.

This chapter has pointed out that one of the reasons behind some of the harshest and cruel *hudud* punishments is the widespread interpretation of the concept of the protection of the five indispensables that focuses on the protection of religion and thereby violates human rights principles and some of the core values and teachings of *Shariah*. It has been pointed out that this traditional reading that elevates the protection of religion inappropriately above the protection of the individuals' rights contradicts *Shariah* and that the protection of religion should therefore rather be interpreted in a way to reflect the religious freedom and the freedom of opinion promoted in the Qur'an.

The view that harsh corporal punishments are necessary for the sake of deterrence has been refuted in this chapter. The argument put forward is that it would be more beneficial for the Muslim society to focus on the rehabilitation of offenders to completely abolish corporal punishments, and replace them with punishments that are compatible with human rights laws.

The proposition that all *hudud* crimes should be treated by *ta'zir* punishments has been presented as a crucial means for reforming *hudud* ordinances. In contrast to the fixed *hadd* punishments, *taz'ir* punishments are left to the discretion of the judge. This allows to treat every case individually and to consider, in each case, the severity of the offence, the special circumstances of the crime and the offender, and the aspect of rehabilitation. This will help to secure justice. The judge should, however, be bound to a limited penalty frame assigned for the kind of crime. The punishments suggested in this chapter range from an admonition, community service to imprisonment and/or a fine. It is argued that the proposition that all *hudud* punishments should be treated as *ta'zir* is legitimate and necessary for the benefit of the people. The suggested punishments can serve those countries that apply *hudud* ordinances as a guideline to reform them and leave enough space to consider the environment in the respective country.

For those punishments that have been developed by Islamic jurists via the application of the method of *ijtihad*, namely, beheading for apostasy, flogging for drinking alcohol and stoning for adultery, this chapter has developed suggestions applying the same method of *ijtihad* to re-interpret them. It is argued that apostasy should not be criminalised at all, since

there is no legal justification for it in the Qur'an. For the same reason the stoning for adultery should be abolished completely. Also for drinking alcohol, no earthly punishment for it is foreseen in the Qur'an. In conservative Muslim countries, though, where drinking alcohol is considered a disturbance of public decency, a fine and/or a prison sentence can be assigned for it.

For those crimes that the Qur'an has assigned punishments for, namely, the crimes of theft, adultery, defamation and *haraba* the chapter has developed alternative punishments that are compatible with international human rights laws. For theft a jail sentence and/or fine is suggested.

Concerning the crime of *zina*, it has been pointed out that the common distinction between 'adultery' (of married people) and 'fornication' (illicit sexual intercourse of unmarried people) contradicts the Qur'an and should therefore be avoided. It is argued that treating the crime of *zina* by a *ta'zir* punishment allows to take the differences of the nature of each case into account. It is suggested that community service and/or a fine should be imposed as the punishment for both adultery and consensual sexual intercourse of unmarried people. The latter is not even considered a crime in most countries, but can, in conservative Muslim societies, be considered a disturbance of public decency. If the woman falls pregnant as a result of the act of *zina*, it is suggested that the man should marry her. If he refuses to marry her, he should be punished with a fine and/or imprisonment and should be responsible to pay maintenance for the child.

Concerning the crime of defamation, it is important to note that the qur'anic prescription aims to protect women from an injustice and from the violation of their honour. It is argued, therefore, that it is very important that the faulty conviction of innocent women is prevented. This is something that frequently occurs in several Muslim countries, including Pakistan. The penalty for false accusations against women should be imprisonment and/or a fine.

The crime of *haraba* refers to all kinds of violent physical attacks against Muslim individuals and Muslim society, including public robbery, murder, and rape. The penalty for all of these should be sentenced with imprisonment. Acts of war against Islam and a Muslim nation, which can even include terror attacks, should be subject to the law of war rather than criminal law. Non-physical actions that are perceived as assaults on Islam or insults of the Prophet do not constitute acts of *haraba* and should not be considered as such.

All the suggested punishments serve justice, respect *Shariah* and serve its purposes that have the benefit of the Muslim society in mind. This is achieved by helping to restore the image and reputation of both Islam and Muslims and by protecting them from harm, namely

by protecting their human rights, their human dignity, freedom of thought and religious freedom, and protecting the public decency and public safety. The core of the *hudud* prescriptions, namely their legal basis in the Qur'an and correct *Sunnah* are not violated and all the proposed suggestions are legitimate and justified since they serve the benefit of the Muslim community. They are thus compliant and compatible with both *Shariah* and international human rights laws.

CHAPTER 7 – CONCLUSION

I Introduction

This thesis has set out to research whether it is possible and legitimate to reform *hudud* ordinances so that Islamic criminal law can be reconciled with internationally recognised human rights, and if so, how this can be achieved.

Islamic criminal law, particularly the *hudud* ordinances, with their extremely harsh and cruel punishments severely violate human rights. These punishments include beheading for apostasy; stoning to death for adultery; flogging for drinking alcohol, fornication and defamation; amputation for theft; and execution, crucifixion, amputation or exile for the crime of *haraba*. These kinds of cruel, inhuman and degrading corporal punishments are outlawed by international human rights laws. *Hudud* ordinances also violate the freedom of religion, opinion and expression and principles of due process and fair trial, and they discriminate against women and non-Muslims. The enforcement of the *hudud* ordinances also damages the reputation of Islam and Muslims in the world.

Countries like Pakistan, Sudan, Saudi Arabia and Brunei Darussalam that practice *hudud* ordinance are, like most other Muslim countries, signatories of the main human rights documents. By enforcing the harsh and inhuman *hudud* punishments, they violate international human rights laws.

One of the reasons why Muslim countries refuse to subordinate their *Shariah*-based laws to international human rights laws is that they reject international human rights laws as a western invention, a human-made and humanistic construct and an assault on the Islamic identity. They generally distrust the west deeply and do not approve of the notion of the universality of human rights. They defend the harshness of the *hudud* punishments, since they believe that deterrence is their main purpose.

At the heart of the problem is that orthodox Muslims believe that *hudud* ordinances cannot be negotiated in any way. They claim that the set of *hudud* punishments has been divinely assigned and is therefore infallible, mandatory and immutable. This argument is used to block out any attempt to reform *hudud* ordinances and sees anyone who dares to question any of them as a blasphemer. This claim that the set of *hudud* punishments is divinely assigned, and thus infallible and immutable, has been refuted in this thesis. It has been pointed out that the *hudud* ordinances, as developed by Islamic jurisprudence, are not fully compliant and compatible with *Shariah*, its primary sources, particularly since some of the punishments have no legal basis in the Qur'an or the correct *Sunnah*.

It has been stressed that it is very important to distinguish between *Shariah* as the divinely assigned rules and regulations recorded in the Qur'an and *Sunnah*, and Islamic law, for the latter also includes such prescriptions that have been developed by Islamic jurists and that cannot be considered fully divine or infallible since they are based on human interpretations and opinions. It has been argued that it is, therefore, fully legitimate — and even important — to reconsider the *hudud* prescriptions developed by Islamic jurisprudence, to verify in how far they really reflect the will and the word of Allah as recorded in the Qur'an and correct *Sunnah*. It has been pointed out that the core values promoted in them, in fact, have much in common with the rights and values protected by international human rights law.

It has been demonstrated that reformation is not an assault on Islamic identity but it is in fact an important Islamic concept deeply rooted in the Qur'an and *Sunnah*. It can be summarised as a call to return to the teachings of the Qur'an and the correct *Sunnah*, and the Islamic core values and requires that Muslims read them in the context of their own time and environment. In other words, *Shariah* requires to consider the reality of life and the needs of the people, and allows to interpret its teachings in a way adjusted to their time and circumstances. The declared purpose of *Shariah* is to serve the benefit of the people and to protect them from harm.

The thesis has shown that *Shariah* — known to be flexible enough to suit all times and every environment — is indeed flexible enough even to reconcile *hudud* punishment with international human rights law. This is possible by applying the Islamic principle of reality (*fiqh al-waqa*), the principle of necessity (*fiqh al-darurah*) and the principle of doubt, all of which have been provided by *Shariah* as powerful instruments to allow considering the reality of life and to make exceptions from what is generally prohibited if this is necessary to secure the benefit of the people. Based on these principles, this thesis has developed suggestions as to how *hudud* ordinances can be reformed and reconciled with international human rights

laws. All the suggestions made in this thesis consider the reality of life of twenty-first century Muslims, while they remain fully loyal to *Shariah*. They have been developed in a religiously sensitive manner that respects the authority of *Shariah* and focuses on its core values and its main purpose, namely the benefit of the people. The main findings of the research will be summarised in the following section.

II Main findings of the research

(a) Questioning *hudud* ordinances is fully legitimate and necessary

It has been demonstrated in this thesis that it is fully legitimate and even necessary to question and examine the *hudud* ordinances as defined by Islamic jurisprudence.

The claim that the set of *hudud* punishments has been divinely assigned and is therefore infallible, mandatory and immutable has been refuted on several grounds. The notion of the allegedly divinely assigned fixed set of *hudud* ordinances can, for example, not be found in the Qur'an or the correct *Sunnah*. It even contradicts *Shariah*, since it does not match the list of crimes that has been pointed out in the correct *Sunnah* as 'the seven most destructive sins'. Further, the claim that the *hudud* punishments cannot be forgiven or amended results from an incorrect use of the term '*hudud*', namely, as referring to the punishments, while the real meaning of the term '*hudud*' is 'crime' or 'limit', defining the boundary between the permissible and the prohibited.

Another strong argument that disproves the notion of *hudud* ordinances as a perfect and infallible set of divinely assigned crimes and punishments is that there are many differences and contradictions between the opinions of the four schools, concerning the exact definitions of the crimes and their punishments. The four main Sunni schools of jurisprudence do not even agree on the number of crimes to be listed as '*hudud* crimes'. In view of all the differences and contradictions it is illogical — and even wrong — to claim that *hudud* ordinances are a divine, perfect, infallible and, thus, a non-negotiable fixed set of crimes and punishments. Most importantly, though, the entire set of *hudud* ordinances, as developed by Islamic jurisprudence is not fully compliant and compatible with *Shariah's* primary sources, the Qur'an and the correct *Sunnah*. Notably, many of the harshest human rights violations result from interpretations of Islamic jurisprudence and have no legal basis in the Qur'an. This is particularly true in respect of the death penalty for apostasy, flogging for drinking alcohol and stoning to death for adultery —punishments that have been developed by Islamic jurists

without legal justification in the Qur'an or the correct *Sunnah*, but mainly based on weak *ahadith*.

The conflict between the *hudud* ordinances and the international human rights laws thus emerges mainly from rulings developed by Islamic jurisprudence and not from the Qur'an or the correct *Sunnah*. In other words, the main obstacle is not *Shariah* but Islamic criminal law that reflects human opinions and interpretations and cannot be considered infallible or divine. The importance of the distinction between *Shariah* and Islamic law, therefore, has been emphasised throughout this thesis.

(b) *Shariah* promotes human rights and reformation and aims to serve the benefit of the people

It has been demonstrated in this thesis that even though many prescriptions of Islamic law are in conflict with human rights, *Shariah* itself can actually be seen as promoting human rights. The Qur'an and the correct *Sunnah* promote human dignity, equality and justice, and the right to life, property and privacy. The protection of 'mind', as one of the five indispensables,¹⁰⁸⁹ can further be understood as protection of freedom of thought. Even the important principle of presumption of innocence, is well known and highly valued in Islam.

Further, reformation has been proven to be an Islamic concept deeply rooted in the Qur'an and the *Sunnah*. It can be described as a call on Muslims to return to the teachings of the Qur'an, the correct *Sunnah*, and the Islamic core values promoted in them. These include justice, fairness, forgiveness, reconciliation, peace and harmony, the protection of life, equality without discrimination, and religious freedom. The Islamic call for reformation, thus, does not aim to change *Shariah*, but it aims to encourage Muslims to change and improve their lives, and to live according to *Shariah's* core values.

The notions of renewal and revival that are included in the Islamic concept of reformation, point to the need that Muslims read the Qur'an and the *Sunnah* in the context of their own time and environment. The notion of the restoration of the religion to its original condition, further, can be understood as implying the need to clear Islamic law from any human interpretation of Islamic jurists that contradicts the Qur'an or its core values or that fit no longer with the reality of life of contemporary Muslims. The Islamic call for reformation, therefore, can be understood as an appeal on Muslims of all generations, including those of today, not to follow blindly the interpretations of early Islamic scholars and jurists, but to

¹⁰⁸⁹ Protection of religion, life, intellect/mind, offspring and money.

practice *ijtihad* and to examine and filter the rulings of Islamic law, including *hudud* ordinances, in the light of the primary sources of *Shariah*, its core values and its main purpose, which is to serve the benefit of the people and to protect them from harm. Any sincere orthodox scholar should, consequently, strive to restore the original meaning of the primary sources of *Shariah* and, if necessary, reinterpret them.

The notion of the protection of religion that is part of the concept of the five indispensables (religion, life, intellect, offspring and money/property) is one of the areas that require a reinterpretation. This is particularly true since it is the traditional understanding of the protection of religion that is responsible for some of the crucial contradictions of *hudud* prescriptions to the Qur'an. The death penalty for apostasy, for example, that contradicts the Qur'an, can be seen as a human effort of Islamic jurists to 'protect the religion'. Another example is the definition of *haraba*. While, according to the Qur'an, the crime of *haraba* refers mainly to physical war against Islam or Muslims, some Islamic jurists have developed a definition that is very wide and includes even any criticism of Islam or insult of the Prophet Muhammad. This alteration of the definition can as well be seen as an effort to protect the religion. As demonstrated in this thesis, human efforts to protect the religion contradict the Qur'an, since Allah made it clear that it is up to Him alone to protect the religion. The notion of the protection of religion should, therefore, be interpreted rather in a way that reflects the qur'anic promotion of freedom of religion.

As previously mentioned, the Islamic call for reformation arguably includes an appeal on Muslims to examine and filter *hudud* ordinances in the light of *Shariah's* primary sources, its core values and its main purpose. The appeal to practice *ijtihad*, further, requires that *Shariah's* prescriptions pertinent to *hudud* ordinances be read in a way adapted to the time and circumstances of the Muslim community. The principles of reality and necessity and the principle of doubt, provided by *Shariah*, enable Muslims to do so, for these principles allow and require the reality of life and the needs of the people to be considered. The principles of reality and necessity allow for exceptions, even from definite prescriptions, if this is necessary to secure the benefit of the people, and the principle of doubt requires averting the *hudud* punishments in cases of doubt. The Prophet Muhammad himself, as well as his companions and successors, applied these principles repeatedly to make exceptions from definite prescriptions and to drop or suspend *hadd* punishments whenever this was necessary for the sake of the benefit of the people.

As demonstrated in this thesis, the understanding of what constitutes doubt and thus requires suspending *hudud* punishments is very wide and encompassing. It includes, for

example, the social, moral and economic condition of a country. According to a widespread understanding of *hudud* ordinances, *hudud* punishment should be practiced only in a perfect society. Since in most contemporary Muslim countries, corruption, poverty, and/or social and economic injustice are evident, it could actually be argued that *hudud* ordinances should be averted completely in these societies. This is just one of several aspects that can be considered to justify or require averting the *hadd* punishments or amending them based on the principle of doubt. The fact that the practice of the *hudud* ordinances with their harsh and cruel punishments seriously damages the reputation of Muslims in the eyes of the world can be seen as another aspect that requires to avert the *hudud* punishments.

In summary, it can be said that the thesis has demonstrated that it is necessary, legitimate and possible to reform *hudud* ordinances. *Shariah* — known to be flexible enough to suit all times and every environment — is flexible enough to reconcile the *hudud* prescriptions with international human rights laws.

(c) Suggestions for reformation

The suggestions for reformation proposed in this thesis do not require changing or putting aside any of the qur'anic definite texts. The thesis does not call to ignore crimes that are defined as such in the Qur'an. It rather suggests that all corporal *hudud* punishments be replaced by punishments that are compatible with international human rights laws, namely, ranging from admonition or community service to imprisonment and/or a fine.

The traditional view that harsh corporal punishments are necessary for the sake of deterrence has been refuted. It has been pointed out that it would be more beneficial for the Muslim society to focus on the rehabilitation of offenders.

One of the main suggestions for reformation is that all *hudud* crimes should be treated by *ta'zir* punishments, for in contrast to fixed *hadd* punishments, *ta'zir* punishments allow to consider, in every case, the severity of the offence, the special circumstances of the crime and the offender, and the aspect of rehabilitation. This allows for justice to be secured. The suggested limited penalty frames prevent arbitrary judgments and exaggerated sentences.

All the suggested non-corporal punishments proposed in this thesis have been developed in full loyalty to *Shariah*. As for apostasy, for example, it has been pointed out that it should not be criminalised at all, since the Qur'an declares that there is no compulsion in religion. Further, the Qur'an has not assigned any earthly punishment for apostasy, but declared that Allah would hold apostates accountable in the afterlife.

Also for drinking alcohol no legal justification for any earthly punishment can be found in the Qur'an or the correct *Sunnah*. From the Islamic legal perspective it would, therefore, be legitimate not to criminalise the consumption of alcohol at all and not to assign any punishment whatsoever for it. In conservative Muslim countries, though, drinking alcohol constitutes a disturbance of public decency and may, therefore, be treated as such. The determination of the severity of the sentence for the public disturbance, however, can differ significantly from one country to another. The suggested penalty range, therefore, runs from an admonition, to a fine and/or an imprisonment to 6 months. The judge should consider, whether the person was actually drunk or not, and whether it was a first or a repeat offence, for the main focus should be on rehabilitation of the offender. .

Concerning the crime of *zina* (adultery and fornication), it has been pointed out that the common distinction between 'adultery' (of married people) and 'fornication' (illicit sexual intercourse of unmarried people) contradicts both the Qur'an and international human rights laws. Treating the crime of *zina* by a *ta'zir* punishment helps to reconcile this conflict, for it allows to assign the same punishment for both crimes and to still consider the differences in terms of the severity of the offence and the special circumstances of the crime and the offender. The punishment suggested for the crime of *zina* is community service and/or a fine. It is argued that this kind of punishment is more appropriate for cases of *zina* than a jail sentence, which would remove a breadwinner or caretaker from the family and would thus impact negatively on the dependants, if either person has children or dependants. If the woman falls pregnant as a result of the act of *zina*, it is suggested that the man should be responsible to pay maintenance for the child. For cases of rape, it is argued that a severe punishment is necessary to bring about justice and to prevent the offender from committing the crime again. A minimum prison sentence of between ten to fifteen years is therefore suggested, with the option to extend the sentence indefinitely if there are doubts concerning the rapist's rehabilitation.

Concerning the crime of defamation, it is important to note that the qur'anic prescription speaks only and explicitly of the protection of women from a miscarriage of justice. The prevention of the faulty conviction of innocent women — particularly that of victims of rape — that frequently occurs in several Muslim countries, including Pakistan, should therefore be paramount. In order to prevent the misuse of the prescriptions concerning defamation, the qur'anic verse of defamation should never be used against women, much less when they report cases of rape. The cruel and humiliating punishment of flogging should be replaced with a prison sentence up to one year and/or fine to be imposed at the discretion of the judge.

The punishment for theft might seem the hardest to reform since it is based on the Qur'an. The exact definition of the qur'anic punishment of 'cutting the hand', however, is not fully clear. While it is traditionally interpreted as referring to the amputation of the hand, it could as well refer to the infliction of an injury, or have a merely metaphorical meaning. This lack of clarity brings the principle of doubt into play and requires that the *hadd* punishment be averted. A jail sentence and/or fine are, therefore, suggested as an alternative punishment.

Concerning the crime of *haraba* that refers to 'those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land', it has been pointed out that this refers to acts of war and includes also all kinds of violent physical attacks against Muslim society, its government, public order or safety, including public robbery, murder, and rape. While acts of *haraba* are subject to law of war, for all these crimes, prison sentences are suggested to replace the extremely cruel corporal punishments of 'crucifixion and cross amputation to imprisonment and banishment'. The understanding of some Muslim scholars who have extended the definition of *haraba* to include verbal and other attacks on Islam or insulting the Prophet has been refuted.

III Main conclusion and contribution of the study

In summary, it can be concluded that if *Shariah* is interpreted and applied correctly, it is possible to reconcile the *hudud* punishments with international human rights laws.

The main suggestion offered in the thesis is that all corporal *hudud* punishments be replaced by punishments that are compatible with international human rights laws, namely ranging from admonition or community service to imprisonment and/or a fine, and that perpetrators of *hudud* crimes should be dealt with by *ta'zir* punishments. It has been demonstrated that the suggested amendment is necessary and legitimate. It is necessary in view of the reality of life of Muslim society in the twenty-first century; and it is legitimate, since all the suggestions have been developed in respect and loyalty to *Shariah* and serve its purposes. The proposed suggestions are based on the Islamic principles provided by *Shariah*, namely the Islamic principles of reality and necessity and the principle of doubt. These allow for the suggested amendments, since they serve the benefit of the people. They help to restore the image and reputation of Muslims and protect them from corporal punishments that violate human rights. The suggested amendments protect the human dignity and rights, and secure public safety and decency and religious freedom. Further, they serve justice, and have the rehabilitation of the offender in view.

It has been demonstrated, thus, that in order to reconcile the *hudud* punishment with international human rights laws, it is not necessary to change or abolish any of the *qur'anic* definite texts, but it is sufficient to follow the Islamic call for reformation by returning to the core values of Islam and focussing on the purpose of *Shariah*.

The approach used in this thesis, namely to tackle the conflict from an Islamic perspective, and using Islamic arguments, can be path-breaking also for those academic researchers who focus on Islam's relationship with human rights. It can help them reform also other areas of Islamic law.

It has been demonstrated in this thesis that the principle of doubt is so wide and encompassing that it would, in fact, justify a complete moratorium on the entire set of *hudud* ordinances, as is suggested by many moderate Muslim scholars. It has been pointed out, though, that it is only their reformation can bring a real long-term solution, for if they were simply set aside, they can easily re-implemented any time, and an appeal for their abolition is very likely to be completely rejected in those countries that practice *hudud* ordinances. A reformation of *hudud* punishment as suggested in this thesis, in fact, should be acceptable even to orthodox Muslims, since all the suggestions proposed in this thesis have been developed in a religiously and culturally sensitive manner and in full compliance with *Shariah*.

It has been pointed out in this thesis that even in moderate or secular Muslim countries where the *hudud* ordinances are not applied, radical Muslim groups that aim to implement Islamic law are engaged in a power struggle against the state. These groups aim to overthrow secular regimes and replace them with Islamic governments that would implement *hudud* punishment, as is the case with the so-called Islamic State in Iraq and Syria (ISIS). Freezing the *hudud* punishment will therefore not fully solve the problem indefinitely.

This is one of the reasons why a long-term solution for the conflict of *hudud* ordinances with human rights is of great importance. It will therefore be more helpful in the long term if Islamic law were reformed rather than ignored. Reforming *hudud* punishments will help those countries that already apply them as well as those who do not, especially since in the latter the more radical Muslims might gain more influence in the future. The suggested approach would eliminate the threat of the influence of the radical groups who are striving for the implementation of the *hudud* ordinances.

(a) Recommendations

This thesis pleads with orthodox Muslim scholars to follow the call of the Prophet Muhammad pronounced in his Farewell Sermon, that being to read and (re)interpret the primary sources for themselves, namely in the context of their own time and environment. They should consider the reality of life of the Muslim community in this day and age while focusing on the Islamic core values and the main purpose of *Shariah* to serve the benefit of the people.

A recommendation to moderate Muslim academics and advocates of human rights is to support efforts to reform *hudud* ordinances and to seek a constructive discussion about *hudud* ordinances with orthodox Muslims. This thesis can help to counter the objections to reformation brought forth by orthodox Muslims, particularly those objections based on the false claim that *hudud* ordinances are a fixed set of divinely prescribed crimes and punishments. For such a discussion to be promising it will be important to distinguish between *Shariah* and Islamic law, for a fruitful dialogue will not be possible if *Shariah* is criticised. If, however, the discussion is based on a respect for *Shariah*, on Islamic arguments and on the Islamic principles introduced in this thesis, orthodox Muslims cannot refute such arguments easily.

(b) Suggestions for further research

A suggested area for further research is the question of how the practical implementation of the suggested reform in Muslim countries can be achieved and how an internal discussion on the topic can be stimulated. This includes a research on the impact of politics on the current enforcement of Islamic criminal law.

Bibliography

Islamic Sources

Holy Qur'an, available at <http://www.islamicity.com>. (If not otherwise noted, quotations are from the Yusuf Ali translation)

Qur'an Commentaries and Dictionaries

Al-Qurtubi, Muhammad Ibn Ahmad *Al-Jami li Ahkam al-Qur'an (Tafsir al-Qurtubi)* (1964) Dar al-Kutub, Cairo.

Al-Razi, Muhammad Ibn Umar *Al-Tafsir al-Kabir* (2004) Dar al-Kutub al-Ilmiyah, Beirut.

Al-Tabari, Muhammed Ibn Jarir *Jami al-Bayan fi Ta'wil ay al-Qur'an (Tafsir al-Tabari)* (1994) Muasasat al-Risalah, Beirut.

Al-Tabari, Muhammad Ibn Jarir *Jami al-Bayan an Ta'wil ayal-Qur'an (Tafsir al-Tabari)* (2001) Dar Hajar Lel Tebaah Waal-Nasher, Cairo.

Al-Tabari, Muhammad Ibn Jarir *Jami al-Bayan fi Ta'wil ay al-Qur'an (Tafsir al-Tabari)* (1997) Dar al-Kutub al-Ilmiyah, Beirut.

Al-Thawri, Sufyan *Tafsir Sufyan al-Thawri* (1983) Dar al-Kutub al-Ilmiyah, Beirut.

Ibn, Ismail Ibn Umar *Tafsir al-Quran al-Azim (Tafsir Ibn Kathir)* 2 ed (1999) Dar Tebah, Riyadh.

Sunan

Abu Dawud, Suleiman Bin al-Ashas *Sunan Abu Dawud* (2008) Darussalam, Riyadh.

Abu Dawud, Suleiman Bin al-Ashas *Sunan Abu Dawud* (2010) Al-Maktanah al-Hadithah, Sidon, Libanon.

Al-Nasa'i, Imam Ahmad *Sunan al-Nasa'i* (2005) Dar al-Fiqr, Beirut.

Al-Nasa'i, Imam Ahmad *Sunan al-Nasa'i* (2007) Darussalam, Riyadh.

At-Tirmidhi, Mohammed Ibn Isa *Jami at-Tirmidhi (Sunan at-Tirmidhi)* (1977) Al-Halabi Publishing, Cairo.

At-Tirmidhi, Mohammad Ibn Isa *Jami at-Tirmidhi (Sunan at-Tirmidhi)* (2007) Darussalam Publishers, Riyadh.

At-Tirmidhi, Muhammad Ibn Isa *Jami at-Tirmidhi* with an English translation by Abu Khalil (2007) Darussalam Publishers, Riyadh.

Al-Bayhaqi, Ahmed Bin Hussein *Al-Sunan al-Kubra* (2003) Dar al-Kutub al-Ilmiyah, Beirut.

Al-Bukhari, Muhammad Ibn Ismail *Al-Jami al-Sahih (Sahih al-Bukhari)* (1997) Darussalam Publishers, Riyadh.

Al-Bukhari, Muhammad Ibn Ismail *Sahih al-Bukhari* (1993) Dar al-Hadith, Cairo.

Al-Bukhari, Muhammad Ibn Ismail *Sahih al-Bukhari* with an English translation by Muhammad Muhsin Khan (1997) Darussalam Publishers, Riyadh, available at

<http://www.usc.edu/org/cmje/religious-texts/hadith/bukhari>, accessed on 6 October 2014.

Al-Khattab, Nasiruddin *Sahih Muslim* English translation (2007) Darussalam, Riyadh.

Ibn Abi Shayba *Al-Musannaf* (1988) Maktabat al-Rushed, Riyadh.

Ibn Hanbal, Ahmad *Musnad al-Imam Ahmed* (1993) Dar Ehya al-Turath al-Arabi, Beirut.

Ibn Kathir, Ismail Bin Umar *Al-Bedayah wal Nihayah* (1997) Hajar Lel Tebaah Wal Nasher, Giza.

Ibn Majah, Muhammad Ibn Yazid *Sunan Ibn Majah* (1998) Dar al-Jeal, Beirut.

Ibn Majah, Muhammad Ibn Yazid *Sunan Ibn Majah* (2007) Darussalam, Riyadh.

Imam Muslim, Ibnal-Hajjal-Naysaburi *Sahih Muslim* (2007) Darusslam, Riyadh.

‘The Last Sermon (Khutbah) of Prophet Muhammad (Farewell Sermon)’ (English translation of the sermon) available at <http://www.iqrasense.com/about-islam/the-last-sermon-khutbah-of-prophet-muhammad-farewell-sermon.html>, accessed on 11 August 2016.

Fatwas

‘Fatawa about the concept of sadd al-zarai’ *Dar-Alifta* 7 March 2012, Cairo, available at <http://www.dar-alifta.org/ViewFatawaConcept.aspx?ID=113&LangID=1>, accessed on 16 May 2014.

Fatwas issued by the General Presidency of Scholarly Research and Ifta, Saudi Arabia, available at <http://www.alifta.net/default.aspx?language=en>, accessed on 2 December 2013.

Fatwas issued by Sheikh Aqil al-Maqtari, available at <http://almaqtari.net/?p=4624>, accessed on 3 November 2015.

Markaz al-Fatwa [Fatwa Center] ‘Qemat al-Dinar al-Qadem fi ayamna’, fatwa no 13551, issued 18 Jan 2002, available at <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=13551>, accessed on 22 December 2015.

International Human Rights Laws, Treaties and Conventions

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) adopted by the UN General Assembly on 10 December 1984 and entered into force on 26 June 1987.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the United Nations General Assembly on 18 December 1979 and entered into force 3 September 1981.

Convention on the Rights of the Child (CRC) adopted by the United Nations General Assembly on 20 November 1989 and entered into force 2 September 1990. International Bill of Human Rights, The Council on Foreign Relations (CFR), Washington, DC, available at <http://www.cfr.org/human-rights/international-bill-human-rights/p27020>, accessed on 10 May 2015.

International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly on 16 December 1966, entered into force 23 March 1976.

International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by the United Nations General Assembly, 15 December 1989.

Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights 25 June 1993.

Universal Declaration of Human rights (UDHR) adopted by the United Nations General Assembly Resolution 271 A (III) of 10 December 1948. United States. Bill of Rights, *US Archives*, available at http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html, accessed on 10 May 2014).

United States. The Constitution of the United States: A transcription, *US Archives*, available at <http://www.loc.gov/law/help/guide/federal/usconst.php>, accessed on 10 May 2015.

Islamic Human Rights Documents

Arab Charter on Human Rights (ACHR) issued by the League of Arab States on 22 May 2004, entered into force 15 March 2008, available at <https://www1.umn.edu/humanrts/instree/loas2005.html>, accessed on 20 July 2015.

Cairo Declaration on Human Rights in Islam, 5 Aug 1990, U.N. GAOR, World Conf. on Hum.Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], available at <https://www1.umn.edu/humanrts/instree/cairodeclaration.html>, accessed on 16 April 2016.

National Laws of Muslim Countries

Brunei

Constitution of Brunei Darussalam, available at

<http://www.parliament.am/library/sahmanadrutyunner/bruneydarusalam.pdf>, accessed on 18 June 2016.

Brunei Shari'ah Penal Code Order (2013), available at [https://www.bsp-](https://www.bsp-lbd.com.bn/LBDDocuments/Syariah%20Law/Syariah_Penal_Code_Order_Summary_Final.pdf)

[lbd.com.bn/LBDDocuments/Syariah%20Law/Syariah_Penal_Code_Order_Summary_Final.pdf](https://www.bsp-lbd.com.bn/LBDDocuments/Syariah%20Law/Syariah_Penal_Code_Order_Summary_Final.pdf), accessed 24 December 2015.

Egypt

Criminal Law 58 of 15 October 1937, amended by law 95 of 2003.

Law of Drinking Alcohol, 63 of 1 August 1976.

Jordan

Penal Code 16 of 1960, available at http://www.mowa.pna.ps/Local_laws/LL12.pdf, accessed on 12 May 2016.

Oman

Islamic Penal Code of the Sultanate of Oman, 1999, Royal Decree No 97/99.

Penal Procedure Law, Royal Decree No 97/99 *Official Gazette*, 15 December 1999 ed 661 vol 28, available at <http://www.icla.up.ac.za/images/un/use-of-force/asia-pacific/Oman/Penal%20Procedure%20Law%20Oman%201999.pdf>, accessed on 4 February 2016.

Pakistan

The Criminal Law (Amendment) Bill, 2013, Bill No. 63-C of 2013, 19 March 2013, available at

<http://www.prsindia.org/uploads/media/Criminal%20Law,%202013/Criminal%20Law%20Amendment%20Bill%20as%20passed%20by%20LS.pdf>, accessed on 15 May 2016.

Abdul Basit, Muhammad 'The constitution of the Islamic Republic of Pakistan with commentary' (2015) FederalLawHouse.com, available at

<http://federallawhouse.com/pub/Constitution%20of%20Pakistan.pdf>, accessed on 15 May 2016.

Saudi Arabia

The Basic Law of Governance Royal order no A/90 of 27th Sha'ban 1412 AH (1 March 1992), Royal Embassy of Saudi Arabia, Washington, DC, available at http://www.saudiembassy.net/print/about/country-information/laws/The_Basic_Law_Of_Governance.aspx, accessed 20 August 2014.

Law of Criminal Procedure [Islamic Penal Code of Saudi Arabia] Royal decree no (M/39) 28 Rajab 1422 AH [16 October 2001], Royal Embassy of Saudi Arabia, Washington DC, available at <http://www.saudiembassy.net/about/country-information/laws/CriminalProcedures2001-1of3.aspx>, accessed 20 August 2014.

Sudan

The Interim National Constitution of The Republic of the Sudan, 2005, available at <http://www.refworld.org/pdfid/4ba749762.pdf>, accessed on 10 May 2016.

Sudan Criminal Code of 1991, (English) available at [https://www.icrc.org/ihl-nat.nsf/0/4d8b568d3792381cc12571100038b7d0/\\$FILE/Criminal%20Act%20-%20Sudan%20-%20EN.pdf](https://www.icrc.org/ihl-nat.nsf/0/4d8b568d3792381cc12571100038b7d0/$FILE/Criminal%20Act%20-%20Sudan%20-%20EN.pdf), accessed on 22 December 2015.

Sudan Criminal Code of 1991, (arabic) available at <http://www.wipo.int/wipolex/en/details.jsp?id=10737>, accessed on 22 December 2015.

Books

Abdul Hafiz, Abdul Rahim Mahbub *Huquq al-Insan fi Zel al-Nizam al-Alami al-Jadid* (2004), available at <http://uqu.edu.sa/page/ar/85694>, accessed on 2 April 2014

Abdul Wahab, Ibrahim Abu Suleiman *Fiqh al-Darurah wa Tatbiqatuhu al-Muaserah* (2003) Al-Mahad al-Islami Lel Buhuth Wal Tadrib, Jeddah.

Abdul Wahab, Muhammad *Al-Durar al-Sunniyah* (1991) Ummal-Qura, Mecca.

Abdulkarim, Khalil *Al-Gesur al-Tarikia lel Shari'a al-Islamiyah: Nahw Fiqhr Islamiy Jadid* (2004) Dar Masr al-Mahrusa al-Islamiya, Cairo.

Abdul Khaliq, Abdul Rahman *Wejub Tatbiq al-Hudud al-Shariah* (1984) Maktabat Ibn Taymiyyah, Kuwait.

Abi al-Barakat, Majd al-Din *Al-Muharar fi al-Fiqh al-Hanbali* (1950) Maktabat al-Sunnah al-Muhammadiyah, Cairo.

- Abi al-Barakat, Majd al-Din *Al-Muharrar fi al-Fiqh al-Hanbali* (1984) Dar al-Kitab al-Arabi, Beirut.
- Abu el-Fadl, Khalid *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (2014) Rowman & Littlefield Publishers, Lanham, Maryland.
- Abu Muanees, Raed Nasri Jamil *Manhag al-Talil bil Hekmah waAtharuhu fi al-Tashree al-Islami* (2007) Al-Mahad al-Alami Lel-Fikral-Islami, Herndon, VA.
- Abu Suleiman, Abdul Wahab Ibrahim *Fiqh al-Darurah wal Tatbiqatuhu al-Muaserah* (2003) Al-Mahad al-Islami Lel Buhuth Wal Tadrib, Jeddah.
- Abu Zahra, Muhammad *Al-Uqubah fi al-Shariah al-Islamiyah* (2003) Dar al-Fikr al-Arabi, Cairo.
- Abu Zahra, Muhammad *Al-Uqubah fi al-Shariah al-Islamiyah* (2008) Dar al-Fikr al-Arabi, Cairo.
- Abu Zahra, Muhammad *Shariaht al-Quran min Dala'el Eajazuh* (1961) Silsilat al-Thaqafah al-Islamiyah, Cairo.
- Abu Zayd, Bakr Bin Abdulah *Al-Hudud wal Tazirat ind Ibn al-Qayim* 2 ed (1994) Dar al-Aasimah, Riyadh.
- Abu Zayd, Nasr Hamid *Al-Tafkir fi Zaman al-Takfir: Didda al-Jahl wa-al-Zayf wa-al-Khuraqah* 2 ed (1994) Maktabat Madbouli, Cairo.
- Al-Aalem, Galal *Qadat al-Gharb Yaquulun Damirw al-Islam wa Abidw Ahluh* (1974) available at <http://waqfeya.com/book.php?bid=4118>, accessed on 1 November 2015.
- Al-Abadi, Muhammad Shams al-Din al-Azim *Awn al-Maabud fi Sharh Sunan Abu Dawud* (2009) Bayt al-Afkar al-Dawliyyah, Riyadh.
- Al-Abadi al-Azim *Awn al-Maabud Sharh Sunan Abu Dawud* (1995) Bayt al-Afkar al-Dawliyyah, Riyadh.
- Al-Adani, Naser Bin Ahmed Bin Ali *Sharh Nawaqed al-Islam* (2010) Dar Omr Ibn al-Khatib, Cairo.
- Al-Aini, Bader al-Din *Al-Binayah Sharh al-Hidayah* (2000) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Aini, Mahmud Bin Ahmad *Al-Binayah fi Sharh al-Hidayah* (1990) Dar al-Fikr, Beirut.
- Al-Alayli, Abdallah *Ayna al-Chatta* (1992) Dar al-Jadid, Beirut.
- Al-Albani, Muhammad Nasir ad-Din *Erwa al-Ghalil* (1985) Al-Maktab al-Islami, Beirut.
- Al-Albani, Muhammad Nasir ad-Din *Silsilat al-Ahadith al-Sahihah* (1995) Maktabat al-Maaref, Riyadh.
- Al-Albani, Muhammad Nasir al-Din *So'al waJawab Hawl Fiqh al-Waka* 2 ed (2001) Al-Maktaba al-Islamiyah, Aman.

- Al-Alwani, Taha Jaber *Ishkaliyat al-Riddah wal Murtadin: Min Sadir al-Islam ela al-Yum* (2006) Maqtabat al-Shuruq al-Dawliyah, Cairo.
- Al-Alwani, Taha Jaber *Ishkaliyat al-Riddah wal Murtadin: Min Sadir al-Islam ela al-Yum* (2006) Al-Mahad al-Alami Lel Fiker al-Islami, Herndon, Virginia.
- Al-Alwani, Taha Jaber *Nahw al-Tajdid wal Ijtihad* (2006) International Institute of Islamic Thought, Herndon, Virginia.
- Al-Alwani, Taha Jaber *Nahw al-Tajdid wal-Ijtihad* (2008) International Institute of Islamic Thought, Herndon, Virginia.
- Al-Amidi, Abu al-Hasan Ali Bin Salim *Al-Ahkam* (2003) Dar al-Sumaei, Riyadh.
- Al-Amidi, Seif al-Din Ali *Al-Ahkam fi Usul al-Ahkam* 2ed (1986) Dar al-Kitab al-Arabi, Beirut.
- Al-Ansari, Zakariyah *Fateh al-Wahab Beshareh Manhaj al-Tulab* (2001) Al-Maktabah al-Salafiyah, Cairo.
- Al-Asbhani, Abu Naim *Marefat al-Sahabah* (1998) Dar al-Watan, Riyadh.
- Al-Asfahani, al-Raghib *Al-Mufradat fi Gharib al-Qur'an* (1412 AH) Dar al-Qalam, Damascus.
- Al-Asqalani, Ibn Hajar *Belugh al-Muram min Adelat al-Ahkam* 6 ed (2004) Darussalam, Riyadh.
- Al-Asqalani, Ibn Hajar *Fath al-Bari fi Sharh Sahih al-Bukhari* (1986) Dar al-Rayan Lel Turath, Cairo.
- Al-Asqalani, Ibn Hajar *Fath al-Bari Sharh Sahih al-Bukhari* (1989) Dar al-Rayan Lel Turath, Cairo.
- Al-Asqalani, Ibn Hajar *Fath al-Bari fi Sharh Sahih al-Bukhari* (1995) Dar al-Rayan Lel Turath, Cairo.
- Al-Asqar, Umar Suleiman *Al-Madhkal ela al-Shariahwa al-Fiqh al-Islami* (2005) Dar al-Nafaes, Amman.
- Al-Awa, Muhammad Salim *Al-Fiqh al-Islami fi Tariq al-Tajdid* 3 ed (2006) Safir al-Dawliyah, Cairo.
- Al-Awadi, Adnan Hussein *Al-Shear al-Suffi hata auful madrasat Baghdad wa zuhur al-Ghazali* (1967) Dar al-Shuaun al-Saqafeya al-Aamah, Baghdad.
- Al-Bagdadi, al-Qadi Abdulwahab *Al-Maunah ala Mazhab al-Imam Malik* (1995) Al-Maktabah al-Tugareyah, Mecca.
- Al-Bahuti, Mansour Bin Yunus Bin Idris *Kashf al-Qenaa an Maten al-Eqna* (1983) Alam al-Kutub, Beirut.

- Al-Baihaqi Ali Ibn Musa *Manaqeb al-Shafei* (1970) Dar al-Turath, Cairo.
- Al-Banna, Ahmad Abdul Rahman *Minhat al-Maabud fi Tartib Musnad al-Tayalisi Abi Dawud* (1980) Al-Maktaba al-Islamiyah, Cairo.
- Al-Banna, Gamal *Al-Fiqh al-Jadid* (1999) Dar al-Shuruq, Beirut.
- Al-Banna, Gamal *Huriyat al-Fikr wa al-Eteqad fi al-Islam* (1977) Dar al-Fiqr al-Islami, Cairo.
- Al-Banna, Gamal *Jenayat Qabilat Hadathana* (2008) Dar al-Fikr al-Islami, Cairo.
- Al-Banna, Gamal *Qadiyat al-Fiqh al-Jadid* (2001) Dar al-Shuruq, Cairo.
- Al-Banna, Gamal *Qadiyat al-Fiqh al-Jadid* (2004) Dar al-Shuruq, Cairo.
- Al-Banna, Gamal *Qadiyat al-Fiqh al-Jadid* (2008) Dar al Shuruq, Beirut.
- Al-Banna, Gamal *Tajrid al-Bukhari wa Muslim min al-Ahadith al-Latti le-Tulzim* (1997) Dar Dawat al-Ehya al-Islami, Cairo.
- Al-Basri, Abdulalah Bin al-Jalab *Al-Tafrayah* (1987) Dar al-Gharibal-Islami, Beirut.
- Al-Berni, Muhammad Asheq Elahi *Al-Tasheel al-Daruri fi Massael al-Qaduri* (1991) Maktabat Bahader Abad, Karachi, Pakistan.
- Al-Bukari, Ibn Mazah *Al-Muheat al-Burhani leMasael al-Mabsut* (2004) Nazeah Kerki, Beirut.
- Al-Daqaq, Shukri and Mahmoud Samir Abdul Fattah *Al-Ahkam al-Asasiyah li-al-Shari'a al-Islamiyah* (2002) Al-Maktab al-Jami'i al-Haditha, Alexandria.
- Al-Dimeji, Saleh Bin Muhammad Bin Umar *Mawqif al-Libralityah fi al-Bilad al-Arabiyah min Muhakimat Addin* (2011) Al-Bayan, Mecca.
- Al-Disuqi, Muhammad Arafa *Hashiat al-Disuqi ala al-Sharh al-Kabir* (1881) Dar Ehya al-Kutub al-Arabiyah, Cairo.
- Al-Disuqi, Muhammad Arafa *Hashiat al-Disuqi ala al-Sharh al-Kabir* (1978) Matbaaal-Halabi, Cairo.
- Al-Dumeri, Bahram *Al-Shamel fi Fiqh al-Imam Malik* (2008) Markaz Nijibaweh, Cairo.
- Al-Enzi, Ali Bin Gared *Araa Ibn Hazm al-Zaheri fi al-Tafsir* (1423) Umm al-Qura, Mecca.
- Al-Fawzan, Salih *Al-Mulahas al-Fiqhi* (2005) Al-Maiman Publishing, Riyadh.
- Al-Fawzan, Salih *Al-Mulahas al-Fiqhi* (2005) Dar al-Aasimah, Riyadh.
- Al-Fawzan, Salih *Mulahas al-Fiqh al-Islami* (2001) Al-Maiman Publishing, Riyadh.
- Al-Gharbawi, Majid *Ishkaliyat al-Tajdid* (2000) Dar al-Hadi, Beirut.
- Al-Gharbawi, Majid *Ishkaliyat al-Tajdid* (2001) Dar al-Hadi Lel Tabea Wal Nasher, Beirut.

- Al-Ghazali, Abi Hamed *Al-Mustasfa min Elm al-Usul* (1993) Al-Madinah al-Munawareh, Medina.
- Al-Ghazali, Abi Hamed *Al-Mustasfa min Elm al-Usul* (1997) Muasasat al-Risalah, Beirut.
- Al-Ghazali, Muhammad *Al-Sunnah al-Nabawiyah Beina Ahl al-Fiqh wa Ahl al-Hadith* (1989) Dar al-Shuruq, Cairo.
- Al-Ghazali, Abi Hamed *Al-Wagez fi Fiqh al-Imam al-Shafei* (2004) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Ghazali, Muhammad *Distur al-Wihda Athakafiyah* (1997) Dar al-Shuruq, Cairo.
- Al-Ghazali, Muhamad *Huquq al-Insan beina Taalimal-Islam wa 'Elan al-Umam al-Mutahida* (2003) Dar Nahdet Mmisr, Cairo.
- Al-Haithami, Ali Ibn Abi Bakr *Magma al-Zawaed waMan ba al-Fawaed* (1994) Maktabat al-Quds, Cairo.
- Al-Halabi, Ibrahim Ibn Mohammed Ibn Ibrahim *Multaqa al-Abhur* (1998) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Hanafi, Muhammad Bin Framuz *Al-Durar al-Hikam fi Gurar al-Ahkam* (2008) Dar Ehya al-Kutub al-Arabia, Damascus.
- Al-Hilali, Saad al-Din *Muqef al-Islam min al-Ridah* (2010) 13, available at <http://www.kantakji.com/media/6109/w302.pdf>, accessed on 3 January 2015.
- Al-Hilali, Saad al-Din Massad *Al-Tasiel al-Shareilel-Khame waal-Mughaderat* (2001) Al-Munazamah al-Arabiya Lel Uloom al-Tebiya, Kuwait.
- Al-Hin, Mustafa, Mustafa al-Bugha & Ali al-Shurbagy *Al-Fiqh al-Manhaji* (1992) Dar al-Qalam, Damascus.
- Al-Huseini, Omer al-Faruk *Mabade Elm al-Ijram waal-Ikab* (2011) University of Banha, Egypt.
- Al-Hussein, Muhammad Bin Abdullah *Al-Zawaed fi Fiqh Imam al-Sunnah Ahmad Ibn Hanbal* (2012) Dar Adua al-Salaf, Riyadh.
- Al-Jarahi, Ismail Bin Mohammed al-Ajlouni *Kashf al-Khafa* (1932) Maktabat al-Quds, Cairo.
- Al-Jaziri, Abdul Rahman *Al-Fiqh ala al-Mazaheb al-Arbaa* 2 ed (2003) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Kabashi, Taha al-Makashifi *Tatbiq al-Shariah al-Islamia fi al-Sudan baina al-Haqiqa wal Eftira* (1986) Al-Zahra Lel Elam al-Arabi, Cairo.
- Al-Kasani, Masaud Bin Ahmad *Badae al-Sana'i fi Tertib al-Sharae* 2 ed (1986) Daral-Kutub al-Ilmiyah, Beirut.
- Al-Khen, Mustafa & al-Buga, Mustafa *Al-Fiqh al-Manhaji ala Mazhab al-Imam al-Shafei* (1992) Dar al-Qalam, Damascus.

- Al-Khershi, Muhammad Ibn Abdulah *Sharh Mukhtaser Khalil* 2 ed (1899) Al-Matbaah al-Ameriyah, Cairo.
- Allawi, Ali A *The Crisis of Islamic Civilisation* (2009) Yale University Press, New Haven and London.
- Al-Luhaidan, Hamad Bin Ali *Al-Sowar al-Muaseah Le-Jaremat al-Harabah* (2011) Jameat Naif Lel-Ulum al-Amniyah, Riyadh.
- Al-Maliki, Kalil Ibn Ishaq *Muktassar Kalil fi Fiqh al-Imam Malik* 2 ed (2004) Al-Madar al-Islami, Beirut.
- Al-Maqdisi, Ibn Qudamah *Al-Muqna fi Fiqh al-Imam Ahmad Ibn Hanbal* (2000) Maktanat al-Sawadi, Jeddah.
- Al-Mawerdy, Abu Al Hasan Ali *Al-Ahkam al-Sultaniyah* (1989) Dar Ibn Qutaibah Kuwait.
- Al-Mazni, Ismael al-Masri *Muktasar al-Mazni fi Ferua al-Shafeiyah* (1998) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Merdawi, Ali Bin Suleman *Al-Ensaf fi Marefat al-Rajah min al-Kilaf* (2004) Bayt al-Afkar al-Duleyah, Aman.
- Al-Mubarakfuri, Muhammad Abdulrahman *Tuhfat al-Ahuzi Sharh Jame al-Termidhi* (1984) Bayt al-Afkar al-Dawliyyah, Beirut.
- Al-Mubarakfuri, Safey al-Din *Al-Rahiq al-Maghtum: Bahth fi al-Serah al-Nabawiyah* (2007) Wizarat al-Awqaf Wal Shaun al-Islamiyah, Doha.
- Al-Munaged, Salah al-Din *Al-Mujtama al-Islami fi zil al-Adalah* 3 ed (1976) Dar al-Kitab al-Jadid, Beirut.
- Al-Munziriri, Abdul Azim Abdul Qawi *Al-Targhib wal-Tarhib* (2003) Maktabat al-Maaref, Riyadh.
- Al-Muqadem, Mohammed Ismail *Khwater Hawla al-Wahabyah* (2008) Dar al-Tawhid Lel Turath, Alexandria.
- Al-Nabulsi, Abdul Ghani *Hashiat al-Libdi ala na'il al-Maareb fi al-Fiqh al-Hanbali* (1999) Dar al-Bashaer al-Islamiyah, Beirut.
- Al-Nagi, Lamin *Al-Qadeam wal Jadid fi Fiqh al-Shafeai* (2007) Dar Ibn al-Qayyim, Riyadh.
- Alnaisaburi, Nizamuddin Hassan Bin Mohammed *Garaeb al-Quranwa Ragaeb al-Furqan* (1996) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Najdi, Abdulrahman *Hashiat al-Raud al-Murabbaala Zad al-Musaqna* (1976) Dar al-Minhaj, Riyadh. Al-Najjar, Abdul Majid *Maqased al-Shariah* (2006) Dar al-Gharibal-Islami, Beirut.
- Al-Nassafi, Abdulah Bin Ahmad *Kenz al-Daqaq* (2011) Dar al-Seraj, Medina.

- Al-Nawawi, Yahya Ibn Sharaf *Al-Magmua Sharh al-Muhazab* (2005) Bayt al-Afkar al-Dawliyyah, Aman.
- Al-Nawawi, Yahya Ibn Sharaf *Al-Minhaj Sharh Sahih Muslim* (1972) Dar Ehya al-Turath al-Arabi, Beirut.
- Al-Nawawi, Yahya Ibn Sharaf *Minhaj al-Talibin* (2005) Dar al-Minhaj, Cairo.
- Al-Nawawi, Yahya Ibn Sharaf *Shareh Maten al-Arbaaun al-Nawawiyah fi al-Ahadith al-Sahehah al-Nabawiyah* 4ed (1984) Maktanat al-Fateh, Damascus.
- Al-Nayhum, al-Sadiq *Islam didd-Islam* (2000) Riyadh al-Rayes Publishing, Beirut.
- Al-Otaibi, Saleh Bin Ali *Al-Elan an al-Hudud al-Sharaiyah wa Atharoho fi al-Radeh al-Aam* (2000) Jameat Naif al-Arabiyyah Lel Ulum al-Amniyyah, Riyadh.
- Al-Qaisi, Marwan Ibrahim *Human Rights in Islam* (2005) Umm al-Qura University, Mecca, available at <http://arablib.com/harf?view=book&lid=3&rand1=WU1rOVA1JnJmajNz&rand2=aEk5YTA3UihQJTg0>, accessed on 1 June 2016.
- Al-Qaisi, Marwan Ibrahim *Human Rights in Islam* (2005) Umm al-Qura University, Mecca, available at <http://uqu.edu.sa/aasharaf/ar/203477>, accessed on 5 Feb 2014.
- Al-Qaradawi, Yusuf *Al-Fiqh al-Islami beinaal-Asalah wal-Tajdid* 2 ed (1999) Maktabat Wahbah, Cairo.
- Al-Qaradawi, Yusuf *Al-Ijtihad fi al-Shariah al-Islamiyah* (1996) Dar al-Qalam, Cairo.
- Al-Qaradawi, Yusuf *Fiqh al-Aqaliyat al-Muslima* (2001) Dar al-Shuruq, Cairo.
- Al-Qaradawi, Yusuf *Ghair al-Muslimin fi al-Mujtama' al-Islami* (1992) Maktabat Wahba, Cairo.
- Al-Qaradawi, Yusuf *Min Azhl Sahwa Ra'shida* (2001) Dar al-Shuruq, Cairo.
- Al-Qaradawi, Yusuf *Mugibat Tagjir al-Fatwa fi Assrina* (2008) Dar al-Shuruq, Cairo.
- Al-Qaradawi, Yusuf *Shariat al-Islam Salehah lel Tatbiq fi Kul Zaman wa Makan* 5 ed (1997) Maktabat Wahbah, Cairo.
- Al-Qarafi, Ahmad Ibn Idris *Al-Furuq* (1998) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Qarafi, Ahmed Ibn Idris *Al-Furuq* (1998) Al-Maktabah al-Ilmiyah, Beirut.
- Al-Qarafi, Ahmad Ibn Idris *Al-Zakerah* (1994) Dar al-Garibal-Islami, Beirut.
- Al-Raisuni, Ahmad *Nazariyat al-Maqased Aend al-Shatibi* (1995) Al-Mahad al-Alami Lel Fikr al-Islami, Herndon, Virginia.
- Al-Rassa, Mohammed al-Ansari *Manageb al-Shafei* (2003) Dar al-Kutub al-Ilmiyah, Beirut.

- Al-Rassa, Mohammed al-Ansari *Shareh Hudud Ibn Arafah* (1993) Dar al-Gharibal-Islami, Beirut.
- Al-Razi, Fahr al-Din *Mafatih al-Ghaib* (1981) Dar al-Fikr, Beirut
- Al-Razi, Mohammed Ibn Umar *Manaqeb al-Shafei* (1986) Maktabat al-Kuliyat al-Azariyah, Cairo.
- Al-San'aani, Muhammad Bin Ismail *Subul al-Salam al-Muwselah ela Belug al-Muram* (1997) Dar Ibn al-Juzi, Al-Dammam.
- Al-Sabagh Abdul Latif al-Shirazi *Dawa Tanaqod Ahkam al-Hudud wa Fehm al-Hader* (1976) Jameat Bengasi, Bengasi.
- Al-Sagestani, Suleiman Ibn al-Ashas *Sunan Abi Dawud* (2009) Dar al-Resalah al-Alamiyah, Damascus.
- Al-Saidi, Abdel Metaal *Al-Mujadedun fi al-Islam min al-Qarn al-Awal ela al-Qarn al-Rabea Ashar* (1996) Maktabat al-Adab, Cairo.
- Al-Sakhawy, Mohammed Bin Abdul Rahman Bin Mohammed *Al-Maqased al-Hasanah* (1989) Dar al-Kitab al-Arabi, Beirut.
- Al-Sakhawy, Mohammed Bin Abdul Rahman Bin Mohammed *Al-Maqased al-Hassanah Fima Eshtuhera ala al-Alsenah* (1985) Dar al-Kitab al-Arabi, Beirut.
- Al-Samara'i, Noman Abdul Razeq *Ahkam al-Murtad* (1983) Dar al-Oulum, Riyadh.
- Al-Saqqaf, Alawi Bin Abdul Qadir *Al-Tawasut wal Eteqad fi Ana al- Kufer Yakun Ema be al-Qawl au be al- Feal au al-Eteqad* (1999) Dar Ibn al-Qayyim, Dammam.
- Al-Shafei, Muhammad Bin Idris *Al-Um* (2001) Bayt al-Afkar al-Dawliyyah, Aman.
- Al-Shanqaiti, Mohammed Abdullah Habayballah *Tabyeen al-Masalek le Tadreb al-Salk* (2013) Dar Ibn Hazm, Beirut.
- Al-Shanqiti, Muhammad al-Muhtar *Sharh Zad al-Mustanqa fi Ehtisar al-Muqna* (2007) Al-Riassah al-A'ma Lel Buhuth al-Ilmiyah Aal Ifta, Riyadh.
- Al-Sharawi, Muhammad Metwali *Khawater Haula al-Quran al-Karim* (1991) Muasasat Akhbar al-Yum, Cairo.
- Al-Shatibi, Abu Ishaq *Al-Muwafaqat* (1997) Dar Ibn Afan, al-Khubar, Saudi Arabia.
- Al-Shatibi, Abu Ishaq *Al-Muwafaqat fi Usul al-Shariah* (2004) Al-Maktaba al-Ilmiyah, Beirut.
- Al-Shatibi, Ibrahim Ibn Musa Allkhmi *Al-Muwafaqat fi Usul al-Shariah* (2004) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Shawkani, Muhammad *Ershadal-Fuhul ela Tahqeq elm al-Usul* (1998) Dar al-Salam, Beirut.

- Al-Shawkani, Muhammad *Fath al-Qadir al-Jamea beina Fan al-Riwaya wa al-Dirayah min Aelm al-Tafsir* (2010) Dar al-Fikr, Beirut.
- Al-Shawkani, Muhammad *Nail al-Autar* (1993) Dar al-Hadith, Cairo.
- Al-Sheha, Abdul-Rahman *Human Rights in Islam and Common Misconceptions* (2010), available at <http://www1.umn.edu/humanrts/research/Egypt/HumanRightsinIslam.pdf>, accessed on 12 July 2015.
- Al-Sherazi, Abi Ishaq *Al-Muhazab fi Fiqh al-Imam al-Shafei* (1992) Dar al-Qalam, Damascus.
- Al-Sherbini, Mohammed Bin Ahmed al-Khatib *Mughni al-Muhtaj ela Marefat Maani Alfaz al-Mihaj* (1994) Al-Maktabah al-Ilmiyah, Beirut.
- Al-Shirqawi, Abdullah *Al-Tatawor Ruh al-Shariah* (1996) Al-Maktaba al-Asriya, Saida, Libanon.
- Al-Siuti, Jalaluddin *Al-Ashba wal Nazaer fi Qawaed wa Forua al-Fiqh al-Shafei* (1983) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Tabari, Ibn Jarir *Tarikh al-Rusul wal Muluk* (1968) Dar al-Maaref, Cairo.
- Al-Tabari, Muhammad *Tarikh al-Tabari* 2 ed (1969) Dar al-Maaref, Cairo.
- Al-Tahtawy, Ali Ahmed Abdel, *Shareh Kitab Haq al-Jar lel Emam al-Zahabi* (2005) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Turki, Abdullah Bin Abdul Mohsin *Huquq al-Insan fi al-Islam* (1998) Wazarat al-Shuaun al-Islamiyah, Riyadh, available at http://d1.islamhouse.com/data/ar/ih_books/single/ar_hokak_alnsan_in_islam.pdf accessed on 3 November 2015.
- Al-Twagri, Muhammad Bin Ibrahim *Muktassar al-Fiqh al-Islami* 11 ed (2010) Dar Asdaa al-Mugtamaa, Baridah, SA.
- Al-Uthaymin, Muhammad Ibn Saleh *Fatawa wa Rasael Ibn Uthaymeen* (1413 AH) Dar al-Watan Publishing, Riyadh
- Al-Uthaymin, Muhammad Ibn Saleh *Muzakerat al-Fiqh* (2002) Dar al-Ghad al-Jadeed, Cairo.
- Al-Zarkashi, Badr Eddin *Al-Manthur fi al-Qawaed* (2000) Dar al-Kutub al-Ilmiyah, Beirut.
- Al-Zarqa, Ahmed *Sharh al-Qawaed al-Fiqhiyya* 2 ed (1989) Dar al-Qalam, Damascus.
- Al-Zarqa, Mustafa *Fatawa al-Zarqa* (2010) Dar al-Qalam, Damascus.
- Al-Zeyni, Mahmoud *Al-Darura fi al-Shari'a al-Islamiyah Watatbiqaa'tiha: Dirasa Murqarana* (1993) Muasasat al-Thaqafa al-Islamiya, Alexandria.
- Al-Zoheily, Mohammed *Al-Muatamad fi al-Fiqh al-Shafei* 3 ed (2011) Dar al-Qalam, Damascus.

- Al-Zuheili, Wahba *Al-Fiqh al-Islami wa Adelato* 4 ed (1998) Dar al-Fikr, Damascus
- Al-Zuheili, Wahba *Usul al-Fiqh al-Islami* (1986) Dar al-Fikr, Damascus.
- Andreopoulos, George J ‘Universal Declaration of Human Rights (UDHR)’ in *Encyclopedia Britannica* (2014) available at <http://www.britannica.com/EBchecked/topic/618067/Universal-Declaration-of-Human-Rights-UDHR>, accessed on 10 May 2015.
- An-Na'im, Abdullahi Ahmed *Towards an Islamic Reformation, Civil Liberties, Human Rights, and International Law* (1990) Syracuse University Press, Syracuse, NY.
- An-Na'im, Abdullahi Ahmed ‘Translators’ introduction’ in Mahmoud Mohamed Taha *The Second Message of Islam*, Syracuse University Press, 1987.
- Ashur, Muhammad al-Taher *Makased al-Shariah al-Islamiyah* (2001) Dar al-Nafaes, Beirut.
- Audah, Abdul Qadir *Al-Tasheria al-Jinai al-Islami Muqaranan bil Qanun al-Wadai* (2008) Dar al-Kitab al-Arabi, Beirut.
- Audah, Abdul Qadir *Al-Tasheria al-Jinai al-Islami Muqaranan bil Qanun al-Wadai* (2011) Daral-Kutub al-Ilmiyah, Beirut.
- Audah, Gasser *Al-Ijtihad al-Makassedi min al-Tasawor al-Usuli Ela al-Tanzil al-Amali* (2013) Al-Shabakah al-Arabiyyah Lel Abhas Wal Nasher, Beirut.
- Baho, Mustafa *Al-Elmanijun al-Arab wa Mawqefuhum mina al-Islam* (2011) Al-Maktaba al-Islamiya, Cairo.
- Bashir, Edris *Al-Raa'y wa Atharoh fi al-Fiqh al-Islami* (2006) Dar Ehyahal-Kutub al-Arabiya, Cairo.
- Beltaji, Muhammad *Manhaj Omr Ibn al-Khattabfi al-Tashria: Derassah Mustaweba le Fiqh Omr wa Tanzematah* (1970) Dar al-Fikr al-Arabi, Cairo.
- Bloch, Ernst *Natural Law and Human Dignity* 3 ed (1996) Massachusetts Institute of Technology, Cambridge, MA.
- Brems, Eva *Human Rights: Universality and Diversity* (2001) Martinus Nijhoff Publishing, The Hague.
- De Baets, A ‘History and historiography of human rights and their abuses’ in *International Encyclopedia of the Social & Behavioral Sciences* (2001) 7016–7018, available at https://www.culturahistorica.es/de_baets/history_of_human_rights.pdf, accessed on 4 July 2014.
- Donnelly, Jack *Universal Human Rights in Theory and Practice* (2003) Cornell University Press, Ithaca, NY.
- Emara, Mohamed *Al-Islam wa Huquq al-Inssan* (1990) Alam al-Maarifa, Kuwait.

- Finkel, Irving *The Cyrus Cylinder: The King of Persia's Proclamation from Ancient Babylon* (2013) I. B. Tauris, London.
- Foda, Faraj *Qable al-Suqut* (1992) Al-Hayatal-Masriyaal-Amah Lel Kitab, Cairo.
- Ghanem, Ibrahim al-Bayoumi *Al-Gharb fi Roeyat al-Harakah al-Islamiyah al-Messriyah* (1999) Dar al-Wafa, Cairo.
- Gharbawi, Majid *Ishkaliyat al-Tajdid* (2000) Dar al-Hadi, Beirut.
- Gharbawi, Majid *Ishkaliyat al-Tajdid* (2001) Dar al-Hadi Lel Tabea Wal Nasher, Beirut.
- Habash, Mohammad *Corporal Punishment and Human Dignity for a New Islamic Jurisprudence against Torture* (2015) Scandinavian Institute for Human Rights, Geneva.
- Haj Ahmad, Muhammad Abu al-Qasim *Jadaliyat al-Ghayib Wa'al-Inthan Waal-Tabiyahal-A'alamiyah al-Thaniyah* (2004) Dar al-Hadi, Beirut.
- Harper, Robert Francis *The Code of Hammurabi: King of Babylon 2ed* (1904) University of Chicago Press, Chicago.
- Harrelson, Walter J *The Ten Commandments and Human Rights* (1977) Mercer University Press, Macon, Georgia.
- Hasana, Omr Ebeid *Maqalat fi al-Tafkir al-Maqasedi* (1999) Al-Maktab al-Islami, Damascus.
- Hashwah, Maher Hussein *Fiqh al-waqeh wa atharoh fi al-ijtihad* (2006) Al-Gameah al-Ordeneyah, Amman.
- Heikal, Mohamed Hassanein *Madafia Ayatollah: Qisat Iran al-Thaura* 6 ed (2002) Dar al-Shuruq, Cairo.
- Ibn Abd al-Bar *Jamea bayan al-Elm wa fadluh* (1994) Dar Ibn al-Juzy, Al-Damam.
- Ibn Abidin, Muhammad Amin *Al-Dur al-Mukhtar Shariah Tanweer al-Absar* (2003) Dar Alam al-Kutub, Riyadh.
- Ibn Abidin, Muhammad Amin *Rad al-Mehtar ala al-Dur al-Muhtar* (1992) Dar al-Fikr, Beirut.
- Ibn al-Arabi *Ahkam al-Quran* (2003) Dar al-Kutub al-Ilmiyah, Beirut.
- Ibn al-Athir *Assad al-Ghabah* (1994) Dar al-Kutub al-Ilmiyah, Beirut.
- Ibn al-Jauzy, Abu'l-Faraj *Zad al-Masir* (2004) Al-Maktab al-Islami, Beirut.
- Ibn al-Qayyim al-Jawziyyah, Muhammad Ibn Abi Bakr *I'laam al-Muwaqi'een* (1991) Dar al-Kutub al-Ilmiyah, Beirut.
- Ibn al-Qayyim al-Jawziyyah, Muhammad Ibn Abi Bakr *I'laam al-Muwaqi'een* (1991) Al-Maktaba al-Ilmiyah, Beirut.

- Ibn al-Qayyim al-Jawziyyah, Muhammad Ibn Abi Bakr *I'laam al-Muwaqi'een* (2015) Dar Ibn al-Jawzi, Riyadh.
- Ibn Qayyim al-Jawziyyah, Muhammad Ibn Abi Bakr *I'laam al-Muwaqeen An Rab al-Alamen* (1991) Dar al-Kutub al-Ilmiyah, Beirut.
- Ibn Asaker, Ali Ibn al-Hasan Ibn Hibatallah *Al-Tawba* (2001) Dar Ibn Hazm, Beirut.
- Ibn Ashour, Mohamed al-Tahar *Maqased al-Shariah al-Islamiyah* (2000) Dar al-Nafaes, Aman, Jordan.
- Ibn Battuta, Mohammed Bin Abdullah Bin Mohammed Bin Ibrahim *Rihlat Ibn Battuta* (1987) Dar Ehya al-Ulum, Beirut.
- Ibn Hajar al-Asqalani, Ahmed Ibn Ali *Al-Esabah* (2002) Markaz Hajar, Cairo
- Ibn Hajar al-Asqalani, Ahmed Ibn Ali *Fath al-Bari fi Sharh Sahih al-Bukhari* (1959) Dar al-Marefa, Beirut.
- Ibn Hajar al-Asqalani, Ahmed Ibn Ali *Fath al-Bari fi Sharh Sahih al-Bukhari* (1986) Dar al-Riyan, Cairo.
- Ibn Hajar al-Asqalani, Ahmed Ibn Ali *Fath al-Bari Sharh Sahih al-Bukhari* (1989) Dar al-Maarifa, Beirut.
- Ibn Hanbal, Ahmad *Al-Musnad* (2008) Dar al-Minhaj, Riyadh.
- Ibn Hisham, Almuferi *Al-Sirah al-Nabawiyah* 2 ed (2009) Dar Ibn Hazm, Beirut.
- Ibn Juzy, Muhammad Ibn Ahmad *Al-Qawanin al-Fiqhiya* (2009) Muasasat al-Kutub al-Thaqafiyah, Beirut.
- Ibn Kathir, Ismail Ibn Umar *Al-Fusul fi Eghtesar Serat al-Rassul* (2010) Dar al-Nawader, Kuwait.
- Ibn Khaldun, Abu Zayd Abd al-Rahman Ibn Muhammad *Muqaddimah Ibn Khaldun* (1984) Al-Dar al-Tunesiyah Lel Nasher, Tunis.
- Ibn Malik, Anas *Muwatta Malik* (1985) Mustafa al-Halabi, Cairo.
- Ibn Manzur *Lisan al-Arab* (2008) Dar al-Maarif, Cairo.
- Ibn Najm, Umar Bin Ibrahim *Al-Naher al-Faeq fi Sharh Kenz al-Daqaeq* (2002) Dar al-Kutub al-Ilmiyah, Beirut.
- Ibn Qatebah, Muhammad Abdullah Bin Muslim *Tawel Muchtalaf al-Hadith* (1999) Al-Maktab al-Islami, Beirut.
- Ibn Qudamah, Abdulah Ibn Ahmad *Al-Mughni* (1985) Dar Ehya al-Turath al-Arabi, Beirut.
- Ibn Qudamah, Abdullah Ibn Ahmad *Al-Mughni* (1997) Dar Alam al-Kutub, Riyadh.

- Ibn Qudamah, Abdullah Ibn Ahmad *Al-Muqna fi Fiqh al-Imam Ahmad Ibn Hanbal* (2000) Maktabat al-Sawadi, Jeddah.
- Ibn Qudamah, Abdullah Ibn Ahmad *Umdat al-Fiqh fi al-Mazhab al-Hanbali* (2003) Al-Maktabah al-Assriyah, Beirut.
- Ibn Taymiyyah, Ahmed Bin Abdul-Halim *Al-Fatawa al-Kubra* (1987) Al-Harf Publishing House, Cairo.
- Ibn Taymiyyah, Ahmed Bin Abdul-Halim *Al-Saarim al-Maslul ala Shatim al-Rasul* (1997) Ramadi Lel-Nasher, Dammam, Saudi Arabia.
- Ibn Taymiyyah, Ahmed Bin Abdul-Halim *Al-Saarim al-Maslul ala Shatim al-Rasul* (2001) Dar Elam al-Fawaed, Mecca.
- Ibn Taymiyyah, Ahmed Bin Abdul-Halim *Al-Siasa al-Sharaiyah fi Islah al-Raey wal-Raiyiah* (1997) Majma al-Fiqh al-Islami, Jeddah.
- Indian, Ali al-Mutaqi *Kanz al-Ummal fi Sunan al-Af'al wa al-Aqwāl* (2005) Bayt al-Afkar al-Dawliyyah, Amman.
- Inwood, Brad *Stoicism: The Cambridge History of Philosophy in Late Antiquity* (2011) University of Cambridge Press, Cambridge.
- Ishay, Micheline R *The History of Human Rights: From Ancient Times to the Globalization Era* (2004) University of California, Berkeley. *Islamic Dictionary*, available at <http://www.islamic-dictionary.com/index.php?word=fiqh>, accessed on 11 June 2014.
- Ismail, Shahrul Mizan *The Dilemma of Hudud and International Human Rights: Proposing a Benevolent Mechanism* (2006) International Islamic University of Malaysia.
- Jumah, Imad Ali *Al-Mulakhasat al-Fiqh'hiyah al-Mujazara* 2 ed (2003) Maktabat al-Malik Fahd, Riyadh.
- Jumah, Imad Ali *Al-Mulakhasat al-Fiqh'hiyah al-Mujazara* (2004), available at <http://download-islamic-pdf-ebooks.com/9057-free-book>, accessed on 19 December 2013.
- Kamali, Mohammad Hashim *Shari'ah Law: An Introduction* (2008) Oneworld Publications, London.
- Khatab, Hassan ‘Qaedat al-darurat tubeh al-mahzurāt wa tatbeqatuha al-muaserah’ (2009) 165 (2) *Magalatal-Noazl wal Ausul*, available at <http://iefpedia.com/arab/wp-content/uploads/2011/02/%D8%A7%D8%B4%D8%AF-%D8%A7%D8%B4%D8%A8%D8%A8%D8%A8%D8%A8%D8%A8%D8%A8-%D8%A7%D8%B4%D8%A8%D8%A8%D8%A8%D8%A8%D8%A8%D8%A8.pdf>, accessed on 8 November 2015.
- Ki-Moon, Ban ‘Preface’ in United Nations *Moving away from the Death Penalty* (2014) United Nations, New York, available at

- <http://www.ohchr.org/Documents/Issues/DeathPenalty/MovingAwayDP.pdf>, accessed on 24 July 2015.
- Kugle, Scott Siraj al-Haqq 'Sexuality, diversity, and ethics in the agenda of progressive Muslims' in Omid Safi, Omid (ed.) *Progressive Muslims: On Justice, Gender, and Pluralism* (2003) Oneworld Publications, Oxford 190–234, available at http://othersheepexecs.com/Other_Sheep_Resource_Sexuality_Diversity_and_Ethics_in_the_Agenda_of_Progressive_Muslims_by_Scott_Siraj_al_Haqq_Kugle.pdf, accessed on 3 July 2015.
- Kuwait. Wazarat al-Aukaf wal Shu'un al-Islamiyah *Al-Mausua al-Fiqhiyah al-Kuweitiyah* (1983), available at <http://waqfeya.com/book.php?bid=878>, accessed on 30 May, 2016.
- Landman, Todd & Edzia Carvalho *Measuring Human Rights* (2010) Routledge, New York.
- Mahbub, Abdul Hafiz Abdul Rahim *Huquq al-Insan fi Zel al-Nizam al-Alami al-Jadid* (2004) Umm al-Qura University, Mecca, Saudi Arabia. available at <http://uqu.edu.sa/page/ar/85694>, accessed on 2 April 2014.
- Mahmud, Mustafa *Al-Quran Kaen Hai* (1993) Dar al-Maarif, Cairo.
- Mahmud, Mustafa *La Rajm fi al-Islam* (2000) Maktabat Madbully al-Sagher, Cairo.
- Mansour, Ahmed Subhy *Al-Qur'an wa Kafa Masdaran lel Tashriyah al-Islami* (2005) Muasasat al-Inteshar al-Arabi, Beirut.
- Mansour, El-Shahat Ibrahim *Al-Madekal fi al Shariah al-Islamiya* (2007) Faculty of Law, University of Banha, Banha.
- Mawdudi, Abul A'la *Human Rights in Islam* (1977) Islamic Publications LTD, Lahore.
- Mufti, Mohamed Ahmed & Sami Saleh al-Wakel *Huquq al-Insan fi al-Fikr al-Syasi al-Gharbe wa al-Sharia al-Islami* (1992) Dar al-Nahdah al-Islamiyah, Rabat.
- Obohafy, Mansour *Al-Elmaneun wa Ansanat al-Quran* (2010) Maktabat al-Nafezah, Giza.
- Omar, Nouredine *Ulum al-Qur'an* (1993) Matbahatal-Sabah, Damascus.
- Peters, Rudolph *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (2006) Cambridge University Press, Cambridge.
- Qaderi, Abdullah Ahmad *Al-Hudud waal-Sultan* (1986) Dar al-Mugtama, Khobar, Saudi Arabia.
- Qaisi, Marwan Ibrahim *Human Rights in Islam* (2005) Umm al Qura University, Mecca, available at <http://uqu.edu.sa/aasharaf/ar/203477>, accessed on 5 Feb 2014.
- Qutb, Sayyid *Fi Zilal al-Qur'an* (2010) Dar al-Shuruq, Cairo.
- Ramadan, Tariq *Radical Reform: Islamic Ethics and Liberation* (2009) Oxford University Press, Oxford.,

- Roberts, Glenn L. *Islamic Human Rights and International Law* (2007) Boca Raton, Florida.
- Sabeq, Sayed *Fiqh al-Sunnah* 5 ed (1971) Dar al-Fikr, Beirut.
- Sabeq, Sayed *Fiqh al-Sunnah* (1983) Dar al-Fikr, Beirut.
- Sabeq, Sayed *Fiqh al-Sunnah* (1983) Dar al-Fateh Lel Elam Arabi, Cairo.
- Salal, Abdul Razak Rahim *Huquq al-Insan fi al-Adyan al-Samawiyah* (2008) Dar al-Manaheg, Oman.
- Shabir, Mohamed Osman *Al-Takyif al-Fiqhi Wa Tadbiqatuhu al-Amaliyah Ala Al Waqaeh al-Mustajadah* (2014) Dar al-Qalam, Damascus.
- Shahrur, Mohammed *Al-Kitab wal-Quran* (1990) Al-Ahaly Lel Tabe Wa al-Nasher, Damascus.
- Shalabi, Muhammad Mustafa *Usul al-fiqh al-Islami* (1983) Dar al-Gameiyah, Alexandria.
- Shariati, Ali *Al-Aumah wal Emamah* (2006) Dar al-Amear Lel Thaqafah Wal Ulum, Beirut.
- Simonin, Antoine ‘The Cyrus Cylinder’ *Ancient History Encyclopedia* 18 January 2012, available at <http://www.ancient.eu.com/article/166/>, accessed on 4 July 2014.
- Singh, Sudhir Kumar *Human Rights in Pakistan* (2007) Pentagon Press, New Delhi.
- Sultan, Wafa *A God Who Hates: The Courageous Woman who Inflamed the Muslim World Speaks out against the Evils of Islam* (2011) St. Martin's Griffin, New York.
- Tqosh, Mohammad Sohail *Tarikh al-Arab Qabla al-Islam* (2009) Dar al-Nafaes, Beirut.
- Umaamah, Adnan Mohammed *Al-Tajdid fi al-Fikr al-Islami* (2001) Dar Ibn al-Juzi, Beirut.
- Van Hüllen, Vera ‘Just leave us alone: The Arab League and human rights’ in T Börzel and V van Hüllen, *Governance Transfer by Regional Organizations: Patching Together a Global Script* (2015) Palgrave Macmillan, Houndmills, Basingstoke.
- Wadud, Amina *Quran and Women: Rereading the Sacred Text from a Woman's Perspective* (1999) Oxford University Press, New York.
- Wang, Jing Le *Roeya Tahleleya Le Etrabat al-Sharq al-Awsat* (2014) Al-Markaz al-Qawme Lel Tarjama, Cairo.
- Zakaria, Fouad *Al-Haqiqah wal Wahm fi al-Harakah al-Islamiyah al-Muaserah* (1986) Dar al-Fikr, Cairo.
- Zedan, Abdul Karim *Ahkam al-Zemyeen wal Mustamanin fi Dar al-Islam* (1982) Muasasat al-Risalah, Beirut.
- Ziadeh, Farhat J ‘Criminal law’ in *The Oxford Encyclopedia of the Islamic World*, available at <http://www.oxfordislamicstudies.com/article/opr/t236/e0170>, accessed on 24 October 2015.

Unpublished research papers and theses

Al-Feki, Hasan *Al-magmua al-muzahab fi qawaed al-mazhab* (unpublished MA thesis, Al-Jameah al-Islamiya, Medina 1993).

Al-Jabouri, Abdullah Mohammed *Al-Aqaliyat al-Muslima wa Tagjir al-Fatwa* (unpublished PhD thesis, Gameat al-Shariqa, Shariqa, UAE, 2009), available at <http://www.world-dialogue.org/MWL/fatwa/FCS4R3.pdf>, accessed on 8 November 2015.

Al-Jerjawi, Ziad Ali *Huquq al-Insan fi al-Tarbiya al-Islamiya wa Baad al-Falsafad al-Tarbawiya al-Gharbiya* (unpublished research paper, Jeameeat al-Quds al-Maftuha University, Ramallah, 1993).

Al-Khalidi, Nassir Bin Butte Bin Nassir *Huquq al-Inssan fi Khutbat al-Wadae* (unpublished MA thesis, Jameat Naif Lel-Ulum al-Amneyah, Riyadh., Riyadh 2010).

Taglapt, Hureyah *Al-Ffiqh al-Islami Bena al-Assalah wal Tajdid* (2008) unpublished PhD Thesis University of Batna, Algeria.

Conference papers

Al-Ashmawy, Fawzia ‘Huriyat al-aqidah beina al-Shariah al-Islamiyah wal elan al-alam li-huquq al-insan’ (a research paper presented at the 22nd General Conference of the Supreme Council for Islamic Affairs, Cairo, 2010).

Al-Banna, Gamal ‘Al-islah al-islami al-manshud’ (research paper presented to the Conference for Islamic Reform and Democracy, Sept 2004, Cairo), available at http://www.islamiccall.org/Dirasat_IslahManshud.htm, accessed on 10 June 2014.

Al-Kahtani, Masfar Bin Ali ‘Al-istid’lal be maqased al-Shari’a fi al-nawazel al-mustajadda’ (research paper presented to the International Scientific Conference at Yarmouk University and the International Islamic University of Science Amman, Jordan, 22-23 December 2013).

Al-Namlah, Abdulaziz Abdullah ‘Guhud haiad al-amer bel maruf wal nahi an al-munkar fi hefz al-darurat al-khames’ (paper presented to the conference ‘Al-Husbah Wa Enayat al-Mamlakah Beha’ held in Riyadh on 3 February 2010), available at <http://srd.edu.sa/public/showPublications.aspx?ResearcherID=66&Lang=ar-SA>, accessed on 21 May 2016.

An-Na’im, Abdullahi Ahmed ‘Islam and Human Rights: Beyond the Universality Debate’ (An essay presented to The American Society of International Law, Washington, DC 5-8 April 2000) available at <http://aannaim.law.emory.edu/pdf/dwnld13.pdf>, accessed on 10 March 2014.

Articles

- Aamedy, Suhaib Mustafa ‘Jaremat al-Redah wa uqubat al-mutad fi al-fiker al-Islami al-Muasser’ 2 September 2015, available at http://alhiwarmagazine.blogspot.com/2015/09/blog-post_92.html, accessed on 10 August 2016.
- Abdelaziz, Salma, Catherine E Shoichet, Daniel Burke & Ed Payne, ‘Christian in Sudan sentenced to death for faith’ *CNN News* 16 May 2014, available at <http://www.cnn.com/2014/05/15/world/africa/sudan-christian-woman-apostasy/a>, accessed on 10 December 2015.
- Abdul Fatah, Seif-al-Din ‘Al-Tajdid’, available at http://www.arabphilosophers.com/Arabic/adiscourse/aarabic/arabic_articles/ARenaissanceRenovation.htm, accessed on 30 November 2015.
- Ajlan, Fahd Bin Saleh 'Hta la yatahad as al-nas ana Muhammad Yaqtul Ashabuh' *Majalat al-Bayan*(May-June 2015) 336, available at <http://ar.islamway.net/article/48137/> - □□□□- □□□□ □□ □□□□ □□□□- □□ □□ □□ accessed on 1 February 2016.
- Al-Ajmi, Saad ‘Daiyah Islami kuiti jusder fatwa bi hadr dem rasam al-Karikater al-Danamarki’ *Al-Riyadh* 2 February 2006 no 13737, available at <http://www.alriyadh.com/127563>, accessed on 11 November 2015.
- Al-Allal, Khalid ‘Al-Hanabelah fi muqademat Ibn Khaldon’ *Saa'id al-Fawaed*, available at <http://www.saa'id.net/bahoth/82.htm>, accessed on 1 December 2015.
- Al-Alwani, Taha Jabir ' Lerajm fi al-Qur'an' *Al-Alwani's personal website* 23 October 2014, available at http://www.alwani.net/مكتبة_مقالات_مقالات_كيفية_مقالات/item/547-لا_يُرجى_القرآن_fi_html, accessed on 4 February 2016.
- Al-Alwani, Taha Jabir ‘Okazat al-siyasiin al-mufalisin’ *Al-Alwani's personal website* 25 May 2014, at 9, available at http://www.alwani.net/مكتبة_مقالات_مقالات_كيفية_مقالات/item/489عكاظات_سياسيين_للقياسين_fi_html, accessed on 27 September 2014.
- Al-Alyan, Abdulah Bin Ali ‘Darurat al-tajdid al-feqhi wa al-deni’ *Al-Sharq* 5 April 2015, available at http://www.al-sharq.com/news/details/324513#.VaQC0ltX_dk, accessed on 13 July 2015.
- Al-Ashmawi, Fawzia Huriyat al-Aqedah Bena al-Shariah al-Islamiyah wa al-Elan al-Alami, 5, available at <http://www.kantakji.com/media/6117/w309.pdf>=, accessed on 3 August 2015.
- Al-Audah, Salman ‘Al-Quran Kitab al-Taghyir’ *Islam Today* 23 July 2011, available at <http://www.islamtoday.net/salman/artshow-28-153640.htm>, accessed on 24 August 2014.

- Albulasy, Mohammed & al-Sharif, Abdulaziz 'America tashaq al-maaeyer al-muzdawagah' *El-Watan News*, 6 March 2014, available at <http://www.elwatannews.com/news/details/431349>, accessed on 1 November 2015.
- Al-Dawlah, Jamal Bader 'Mafhum al-uqubah fi al-fikr al-qanuni al-Islami al-muqaran' 19 November 2011, available at <https://drsabrikhalil.wordpress.com/2011/11/19/> accessed on 1 February 2016.
- Al-Eshmawi, Fawzeyah 'Hureyat al-Aqedah bena al-Shariah al-Islamyah wa al-Elan al-Alami', available at <http://www.kantakji.com/media/6117/w309.pdf>, accessed on 3 August 2015.
- Al-Fawzan, Abdul Aziz Bin Fawzan 'Human Rights in Islam' *Ahl al-Hadith*, 19 December 2010, available at <http://www.ahlalhodeeth.com/vb/showthread.php?t=232211>, accessed on 3 January 2014.
- Al-Fawzan, Salih Bin 'Ad darurat al-hams wa hefz al-Islam laha' *Al-Fawzan*, available at <http://www.alfawzan.af.org.sa/node/2294>, accessed on 12 July 2015.
- Al-Fawzan, Salih Bin 'Had al-rajm fi al-zena thabet bel kitab wal Sunnah wal ijma' *Al-Fawzan* 21 March 2015, available at <http://www.alfawzan.af.org.sa/node/15335>, accessed on 4 February 2016.
- Al-Ghazali, Muhammad 'Al-shari'a wal qaanun al-wad' ay: Al-estamar al-tashariay fi biladina', available at <https://www.nfaes.com/Articliesfiles/cb66049e.doc>, accessed on 20 January 2014.
- Al-Hail, Ali 'Qiraa asriyah li tadbiiq al-hudud wifqan li ahkam al-shariah' *Al-Rai al-Youm* 5 February 2015, available at <http://www.raialyoum.com/?p=214304>, accessed on 30 July 2015.
- Al-Harthy, Zuhair 'Alamiyat huquq al-insan wa izdewajeyat al-gharb' *Al-Riyadh* 7 September 2010, available at <http://www.alriyadh.com/557760>, accessed on 3 November 2015.
- Al-Hilali, Saad al-Din 'Gamal al-Islam fi istiqlal wa horiat al-insan' *Roseal-Yusuf Magazine* Cairo 20 July 2013, available at <http://www.rosa-magazine.com/News/4751/> accessed on 13 July 2015.
- Al-Hunaiti, Ahmed Mohamed 'Al-thabat wal-murunah fi al-Shariyah al-Islamiyah bena al-tagdid wa al-enfetah' *Garedat Ulum al-Shariah wal Qanun* 42 (2) 2015 at 413.
- Al-Jazirah 'Al Shariha fi al Sudan: Al-tadbeq wal nataeg' *Al-Jazirah Newspaper* 10 May 2014 Issue 437, available at <http://www.al-jazirah.com/culture/2014/10052014/tar4.htm>, accessed on 1 July 2015.
- Al-Jervi, Ismail 'Al-ejaz al-tashrie fi tahream al-khamer' *Jameat al-Eman Sana'a*, 27 January 2013, available at http://www.jameataleman.org/main/articles.aspx?article_no=1768, accessed on 8 November 2015.

- Al-Kamis, Osman 'Ma al-farq beina ahl al-raa'y wa ahl al-hadith', available at <http://www.almanhaj.com/vb/showthread.php?t=6431>, accessed on 11 June 2014.
- Hamdi Alkhshali and Joshua Berlinger 'Facing fines, conversion or death: Christian families flee Mosul' *CNN* 20 July 2014, available at http://edition.cnn.com/2014/07/19/world/meast/christians-flee-mosul-iraq/index.html?hpt=imi_c2, accessed on 20 July 2014.
- Al-Khudairi, Abdulaziz Bin Abdullah 'Human rights between Shari'a and the international human rights conventions' 7308 (2013) *Al-Eqtessadia*, available at <http://www.aleqt.com/>, accessed on 5 Feb 2014.
- 'Al-Madares al-Salafia al-Moasera: Qera'a fi al-tanaua wal elaka bil achar' *Al-Alukah Network* 21 May 2011, available at <http://www.alukah.net/web/triqi/0/32046/>, accessed on 16 May 2014.
- Al-Mashhadani, Yasser 'Dor al-Iraqueen fi tatweer al muasasah al qadaeyah' *Al-Fustat*, available at http://efustat.blogspot.de/2013/07/blog-post_2377.html, accessed on 27 September 2014.
- Al-Masri, Muhammad Ali 'Hal al-ijtihadat al-fiqhiya juz min al-Shariah al-islamiyah?' *Al-Gabha al-Salafia* 13 April 2014, Cairo, available at <http://gabhasalafia.com/archives/3527#.U3W32l6Qz1o>, accessed on 16 May 2014.
- Al-Medani, Mohammad Amin 'The League of Arab States and the Arab Charter on Human Rights' (2015) *Arab Center for International Humanitarian Law and Human Rights Education (ACIHL)*, available at http://www.acihl.org/articles.htm?article_id=6, accessed on 4 August 2015.
- Al-Munajjid, Muhammad Salih 'Protection of religion' *Sheikh al-Munajjid's personal website*, available at <http://almunajjid.com/6380>, accessed on 5 November 2015.
- Al-Naimi, Kstas Ibrahim 'Al-hudud al-shari'a fi al-Islam' *Jameat Aleman* 27 January 2013, available at http://www.jameataleman.org/main/articles.aspx?article_no=1758, accessed on 3 January 2015.
- Al-Otaibi, Saad Bin Matar 'Usus al-siasa al-sharaiah: Al-istahsan' *Said al-Fawaed*, available at <http://www.saaaid.net/Doat/otibi/27.htm>, accessed on 27 September 2014.
- Al-Qaradaghi, Ali Mohyial-Din 'Al-adel fi al-Quran' *Qaradaghi.com* 14 July 2009, available at http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=608:2009-07-14-14-07-53&catid=107:---q-q---&Itemid=13, accessed on 7 November 2015.
- Al-Qasim, Abdul Rahman Mohammed 'Ahwal huquq al-insan fi al-Sudan amam al-mufawediyah al-Efriqiyah li huquq al-insan wa al-shuoub' *Hurriyat Newspaper* 2

- December 2015, available at <http://www.hurriyatsudan.com/?p=192588>, accessed on 2 December 2015.
- Al-Shubily, Youssef 'Fiqh al-hudud' *Shubily.com*, available at <http://www.shubily.com/index.php?news=92>, accessed on 9 November 2015.
- Al-Sirjani, Raghib 'Al-hudud fi al-Islam', available at <http://islamstory.com> on 14 December 2011, accessed on 20 January 2014.
- Al-Taher, Muhammad Abu 'Al-khitab al-fiqhi al-Islami: Beina lahotiyat al-tajdid wa darurat al-tafkik' *Al-Hurriyat* 7 September 2014, available at <http://www.hurriyatsudan.com/?p=162837>, accessed on 13 July 2015.
- Al-Zahrani, Yahya Ibn Moosa 'Mafased wa khuturat Al-zena' 12 August 2016, available at http://www.denana.com/main/articles.aspx?selected_article_no=6094, accessed on 11 August 2016.
- Amnesty International 'Pakistan: Execution of minor highlights endemic problems in justice system' 10 June 2015, available at <https://www.amnesty.org/en/latest/news/2015/06/pakistan-execution-of-minor-highlights-endemic-problems-in-justice-system/>, accessed on 31 July 2015.
- Amnesty International USA 'Report 2014/2015: The state of the world's human rights' 25 February 2015, 86–87, available at <http://www.amnestyusa.org/research/reports/state-of-the-world-20142015-0>, accessed on 10 January 2016.
- Amnesty International 'Saudi Arabia: Four family members executed for hashish possession' 18 August 2014, available at <http://www.amnesty.org.au/news/comments/35319/>, accessed on 19 August 2014.
- Amnesty USA 'Brunei Darussalam: Revoke new Penal Code allowing stoning, whipping and amputation' Amnesty USA 30 April 2014, available at <http://www.amnestyusa.org/news/news-item/brunei-darussalam-revoke-new-penal-code-allowing-stoning-whipping-and-amputation>, accessed on 1 August 2015.
- Amnesty USA 'Death Penalty and Human Rights Standards', available at <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-and-human-rights-standards>, accessed on 20 July 2015.
- 'Ancient Egyptian Kings' (November 2013) available at <http://www.lawteacher.net/free-law-essays/criminology/ancient-egyptian-kings.php?cref=1>, accessed on 2 August 2015
- Ansarian, Hossein 'Huquq al-inssan fi shariaht Hammurabi' 14 October 2009, available at <http://www.erfan.ir/arabic/6434.html>, accessed on 16 April 2016.
- Astivo, Samir 'Huquq al-Insan fi al-Massihyah' *Al-Hewar al-Mutamadin* 11 April 2008 issue no 2248, available at <http://www.ahewar.org/debat/show.art.asp?aid=131103>, accessed on 30 October 2015.

- Atta, Shaima 'Criminal law in Saudi Arabia' 19 February 2010, *Qatar Law Forum*, available at <http://www.mn940.net/forum/forum29/thread8833.html>, accessed on 23 December 2015.
- Azuddin, Aziff '10 things to know about hudud' 19 March 2015, available at <http://poskod.my/cheat-sheets/10-things-know-hudud/>, accessed on 5 July 2015.
- Bandial, Quratul-Ain 'Implementation of Syariah law' *The Brunei Times* 15 December 2014, available at <http://www.bt.com.bn/news-national/2014/12/15/implementation-syariah-law>, accessed on 26 November 2015.
- Bandial, Quratul-Ain 'Introduction of Syariah Penal approved in Brunei' *The Brunei Times/ANN* 23 October 2013, available at <http://www.thejakartapost.com/news/2013/10/23/introduction-syariah-penal-approved-brunei.html>, accessed on 2 December 2015.
- Bani Ahmed, Khaled Ali Suleiman 'Qaedat sadd al-zara'i' (2009) 25 *Majalat Gameat Dimashq lel Alum al Iqtisadia wal Qanuniyah* 734, available at <http://www.damascusuniversity.edu.sy/mag/law/images/stories/705-742.pdf>, accessed on 27 September 2014.
- Berman, Joshua 'Did human rights begin with Torah?' *Chabad* 7 May 2015, available at http://www.chabad.org/library/article_cdo/aid/1125703/jewish/Did-Human-Rights-Begin-With-Torah.htm, accessed on 10 May 2015.
- Berwal, Ahmed 'Al-farq bena al-Shariah wal fiqh wal qanun' (2007) *Startimes*, available at <http://www.startimes.com/f.aspx?t=6655790>, accessed on 14 April 2014.
- Bielefeldt, Heiner '"Western" versus "Islamic" human rights conceptions? A critique of cultural essentialism in the discussion on human rights' (2000) 28 (1) *Political Theory* at 90–121, available at <http://www.jstor.org/stable/192285>, accessed on 4 January 2015.
- Buhairi, Ahmad 'Sheikh al-Azhar: Ala al-gharb an yahtarem nazrat al-Arab wal Muslimin li manzumat huquq al-insan' *Al-Masry al-Youm* 11 February 2014, available at <http://www.almasryalyoum.com/news/details/391897>, accessed on 3 March 2014.
- Buhindi, Mustafa 'Ahadith ayat ragam al-zani tunaqed ahkam al-Quran' *Hespress* 27 July 2014, available at <http://www.hespress.com/orbites/236954.html>, accessed on 11 November 2015.
- Cerna, Christina M 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 (4) *Human Rights Quarterly* 740–52, available at <http://www.jstor.org/stable/762567>, accessed on 5 August 2014.
- Chappell, Bill 'Christian woman escapes death in Sudan over Conversion' *NPR News* 23 June 2014, available at <http://www.npr.org/sections/thetwo->

[way/2014/06/23/324866607/christian-woman-escapes-death-in-sudan-over-conversion](http://www.aymanalawad.com/way/2014/06/23/324866607/christian-woman-escapes-death-in-sudan-over-conversion), accessed on 10 December 2015.

Cooper, Alexia D, Matthew R Durose, Howard N Snyder 'Recidivism of prisoners released in 30 states in 2005: Patterns from 2005 to 2010' *Bureau of Justice Statistics* 22 April 2014, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>, accessed on 12 January 2016.

Council of Islamic Ideology 'Hudud Ordinance 1979', available at <http://cii.gov.pk/publications/h.report.pdf>, accessed on 1 July 2015.

Council on Foreign Relations (CFR) 'U.S.-Saudi relations' *The Council on Foreign Relations (CFR)* 1 October 2015, available at <http://www.cfr.org/saudi-arabia/us-saudi-relations/p36524>, accessed on 16 April 2016.

'Cyrus Charter of Human Rights cylinder: First charter of human rights', available at <http://www.farsinet.com/cyrus/>, accessed on 10 May 2015.

Dalouani, Tariq 'Tariq Ramadan wa dawatoho le taleq al-hudud' *Majalat al-Asser* 31 March 2005, available at <http://alasr.me/articles/view/6504>, accessed on 17 April 2016.

Durden, Tyler 'UN admits extortion behind removal of Saudi Arabia from child-killer blacklist' *Zero Hedge* 10 June 2016.

Figo, Abdul Salam 'Al-ijtihad wa daruratuhu fi al-asser al-hader' *Majalat Dawat al-Haq* no 283, April 1991, Rabat, Morocco.

Faqihi, Ahmed Host 'Hakaza takalama Nasr Hamed Abu Zeid' *Okaz Newspaper* 13 July 2010, available at <http://www.okaz.com.sa/new/issues/20100713/Con20100713361289.htm>, accessed on 4 January 2015.

Fitzgerald, Andy 'Why won't the west call out Saudi Arabia for persecution of democratic activists?' *The Guardian* 29 December 2013, available at <http://www.theguardian.com/commentisfree/2013/dec/29/saudi-arabia-us-human-rights-persecution-activists>, accessed on 1 November 2015.

Forum of Islamic Jurisprudential Studies 'Al-mazaheb al-fiqhiyah al-arbaa', available at <http://www.ahlalhdeeth.com/vb/showthread.php?t=138694>, accessed on 20 May 2014.

Garland, David. 'You asked why does the U.S. have capital punishment?' available at http://photos.state.gov/libraries/amgov/133183/english/P_You_Asked_WhyCapitalPunishment_English.pdf, accessed on 1 November 2015.

Ghani, Hassan Abdul 'Maana kalamat fiqh' *Islam Message* 17 February 2013, available at <http://fiqh.islammassage.com/NewsDetails.aspx?id=6153>, accessed on 17 July 2014.

Ghasemi, Shapour 'The Cyrus the Great cylinder' (2001) *Iran Chamber Society*, available at http://www.iranchamber.com/history/cyrus/cyrus_charter.php, accessed on 4 July 2014.

- [illegible]

- <http://risemalawi.org/downloads/International%20Bill%20of%20Human%20Rights.pdf>, accessed on 10 May 2015.
- Imran, Rahat 'Legal Injustices: The Zina Hudood Ordinance of Pakistan and its implications for women' *Journal of International Women's Studies* (2005) 7(2), 78-100, available at <http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1435&context=jiws>, accessed on 3 November 2015.
- Ismail, Abdul Rahman Bin Ali 'Maqased al-Shariah' *Islamtoday.net*, 4 December 2010, available at <http://www.islamtoday.net/bohooth/artshow-86-142687.htm>, accessed on 8 November 2015.
- Izwan, Md 'Countries with hudud laws fail to reduce crime, says former top judge' *The Malaysian Insider* 11 February 2014, available at <http://www.themalaysianinsider.com/malaysia/article/countries-with-hudud-laws-fail-to-reduce-crime-says-former-top-judge>, accessed on 30 July 2015.
- Jumah, Ali 'Uqubat al-hudud bena al-taleq wal tadbeq' *On Islam* 3 August 2011, available at <http://www.onislam.net/arabic/madarik/culture-ideas/90481-alsharea.html>, accessed on 7 August 2015.
- Kamali, Mohammed Hashim 'The approved and disapproved varieties of *raa'y* in Islam' (1990) 7 (1) *American Journal of Islamic Social Sciences*.
- Kamali, Mohammad Hashim 'Punishment in Islamic law: A critique of the Hudud Bill of Kelantan, Malaysia' *Arab Law Quarterly* (1998) 13 (3).
- Kesgin, Salih 'A critical analysis of the Schacht's argument and contemporary debates on legal reasoning throughout the history of Islamic jurisprudence' (2011) *The Journal of International Social Research*, vol 4, is 19, available at www.sosyalarastirmalar.com, accessed on 12 August 2016.
- Kirchschläger, Peter 'Universality of human rights' (2011) 22–25, available at <http://www.theewc.org/uploads/files/Universality%20of%20Human%20Rights%20by%20Peter%20Kirchschlaeger2.pdf>, accessed on 5 August 2014.
- Lau, Martin 'Twenty-five years of hudood ordinances: A review' (2007) 64 *Wash. & Lee L.Rev.* 1291, available at <http://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/2>, accessed on 2 February 2016.
- MacKenzie, Cameron 'Building democracy in Pakistan' *Princeton University*, available at <https://www.princeton.edu/jpia/past-issues-1/2002/6.pdf>, accessed on 22 December 2015.
- Madkoar, Mohammed Salam 'Human rights from an Islamic worldview: An outline of hudud, ta'zir & qisas', available at http://www.islamawareness.net/Shariah/sh_article002.html, accessed on 2 February 2014.

- Mansour, Ahmed Subhy ‘Apostasy’ *Ahl-al-Qur'an*, available at http://www.aahl-quran.com/arabic/book_main.php?main_id=35, accessed on 28 September 2014.
- Mansour, Ahmed Subhy ‘Ekzubat al-ragm fi al-hadith’ *Al-Hewar al-Mutamaden* 1 January 2005 art 1065, available at <http://www.ahewar.org/debat/show.art.asp?aid=29051>, accessed on 17 April 2016.
- Mansour, Ahmed Subhy ‘Hadd al-riddah al-mazaum’, available at http://www.aahl-quran.com/arabic/book_main.php?main_id=35, accessed on 1 July 2014.
- Mansour, Ahmed Subhy ‘Human rights need to be Islamic law’, available at http://www.aahl-quran.com/english/show_article.php?main_id=11794, accessed on 29 June 2014.
- Mayer, Ann E ‘Islamic reservations to human rights conventions: A critical assessment’ (1998) 15 *Recht van de Islam* pp. 25–45, available at http://www.verenigingrimo.nl/wp-content/uploads/recht15_mayer.pdf, accessed on 20 July 2014.
- Morello, Carol ‘Iran criticized for human rights abuses in State Department report’ *Washington Post* 25 June 2015, available at https://www.washingtonpost.com/world/national-security/iran-criticized-for-human-rights-abuses-in-state-department-report/2015/06/25/523a83aa-8743-42df-8794-11bf446a0530_story.html, accessed on 16 April 2016.
- Mustafa, Khalid ‘Huquq al-eghuah al-Islameyah wal insaneyah’ *Manaratweb.com*, 20 October 2015, available at [http://www.manaratweb.com/□□□ □- □□□ □ □
□□ □□□ □ □ □- □□ □□□ □□□ □□ / ,](http://www.manaratweb.com/) accessed on 7 November 2015.
- Nurmayani, H.E.N.R. Dewi ‘What are human rights?’ *Global Ethics Network* 7 March 2013, available at <http://www.globalethicsnetwork.org/profiles/blogs/what-are-human-rights>, accessed on 10 May 2015.
- Office of the High Commissioner for Human Rights, ‘The question of the death penalty: Human Rights Resolution 2005/59, 58th meeting, 20 April 2005’, E/CN.4/2005.
- Okon, Etim E ‘Hudud punishments in Islamic criminal law’ (2014) 10 (14) *European Scientific Journal* 227, available at <http://eujournal.org/index.php/esj/article/view/3405/3169>, accessed on 15 July 2015.
- Omar, Saadia Musa & Iqbal Abdul Baqi ‘Taghirat al-dilala fi al-ma’na, derasa fi al-hadith al-nabawi al-sharif’ (2012) 5 *Journal of Science and the Islamic Research*, available at http://islamicjournal.sustech.edu/content_details.php?id=487&chk=619c9ce75eeb8879f40035dc3ada6416, accessed on 27 September 2014.
- Packer, George ‘The moderate martyr: A radically peaceful vision of Islam’ *The New Yorker* 11 September 2006, available at <http://www.newyorker.com/magazine/2006/09/11/the-moderate-martyr>, accessed on 4 January 2015.

- ‘Pakistan decides to withdraw most of reservations on ICCPR, UNCAT’ *The Nation* 23 June 2011, available at <http://nation.com.pk/national/23-Jun-2011/Pakistan-decides-to-withdraw-most-of-reservations-on-ICCPR-UNCAT>, accessed on 12 August 2016.
- Paul, James & Joe Stork ‘The Middle East and human rights’ *Middle East Research and Information Project MER* (1987) 17 (149), available at <http://www.merip.org/mer/mer149/middle-east-human-rights>, accessed on 16 April 2016
- Prokosch, Eric ‘Human rights v. the death penalty: Abolition and restriction in law and practice’ *Amnesty International* 1 December 1998, available at <https://www.amnesty.org/en/documents/ACT50/013/1998/en/>, accessed on 17 April 2016.
- Qarqur, Nabil ‘Hureyat al-mutaqad wa hukm al-rida fi al-Shariah al-Islamiyah’ *Magalat al-Muntada al-Qanuni* 5 (2013) 254.
- Rabb, Intisar A ‘Ijtihad’, *Oxford Islamic Studies*, available at <http://www.oxfordislamicstudies.com/article/opr/t236/e0354>, accessed on 29 April 2016.
- Radelet, Michael L & Traci L Lacoock, ‘Do executions lower homicide rates?: The views of leading criminologists’ (2009) 99 *The Journal of Criminal Law & Criminology* 504.
- Radelet, Michael L & Traci L Lacoock ‘Recent developments: Do executions lower homicide rates? The views of leading criminologists’ (2009) 99 (2) *The Journal of Criminal Law & Criminology*, available at <http://www.deathpenaltyinfo.org/files/DeterrenceStudy2009.pdf>, accessed on 29 July 2015.
- Rahim, Abdul ‘Alam, rajm al-zani akbar garemah fi haq al-den wal inssan’, *Hespress*, 16 July 2012, available at <http://www.hespress.com/writers/58407.html>, accessed on 7 November 2015.
- Ramadan, Tariq ‘An international call for moratorium on corporal punishment, stoning and the death penalty in the Islamic world’ (2012), available at <http://tariqramadan.com/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/>, accessed on 1 November 2015.
- Ramadan, Tariq ‘Stop in the name of humanity’ (2005) *Globe and Mail* (London), available at <http://www.theglobeandmail.com/globe-debate/stop-in-the-name-of-humanity/article735465/>, accessed on 10 August 2015.
- Razi, Mozar ‘Al-elam silah fatah: Al-nifaq al-amriki wa siyasat ezdiwagiyat al-maayir al-gharbiyah’ *Makal Cloud* 25 January 2015, available at <https://www.makalcloud.com/post/5txb7hjgp>, accessed 1 November 2015.
- Richter, Paul ‘U.S. sharply criticizes Iran's human rights record on eve of nuclear talks’ *Los Angeles Times* 25 June 2015, available at <http://www.latimes.com/world/middleeast/la-fg-rights-report-20150625-story.html>, accessed on 1 November 2015.

- Roland, Jon 'The Magna Carta (The Great Charter)' *Constitution Society, USA* 25 Sept 1995, available at <http://www.constitution.org/eng/magnacar.htm>, accessed on 10 May 2015.
- Roland, Jon 'The Petition of Right 1628' *Constitution Society, USA* 18 October 1998, available at <http://www.constitution.org/eng/petright.htm>, accessed on 10 May 2015.
- Roussin, Zahid 'Manhag al-Afghani al-aqli fi sefaulho an al-Islam' (2008) vol 24, 388, no1 & 2 *Magalat Gameat Demasheq*, available at <http://www.damascusuniversity.edu.sy/mag/human/images/stories/3530000.pdf>, accessed on 5 November 2015.
- Russell, Jonathan 'Human rights: The Universal Declaration vs the Cairo Declaration', *LSE's Middle East Centre Blog*, available at <http://blogs.lse.ac.uk/mec/2012/12/10/1569/>, accessed on 2 November 2015.
- Saleh, Abdullah 'Madchal li elm al-fiqh al-Islami', available at <http://www.islamfeqh.com/Nawazel/NawazelItem.aspx?NawazelItemID=1176>, accessed on 17 July 2014.
- Sankur, Mohammed 'Ayat al-ragem laisat men al-Quran' *Hoda al-Qur'an* 14 December 2008, available at <http://hodaalquran.com/details.php?id=10008>, accessed on 11 November 2015.
- Saunders, David 'Understanding the Cyrus cylinder' *Getty Online Magazine* 28 October 2013, available at <http://blogs.getty.edu/iris/understanding-the-cyrus-cylinder-getty-voices/>, accessed on 1 November 2015.
- Savage, David G 'Donald Trump's proposed ban on Muslim immigrants could be legal, scholars say' *Los Angeles Times* 14 December 2015, available at <http://www.latimes.com/nation/la-na-muslim-ban-legality-20151214-story.html>, accessed on 3 February 2016.
- Schmitt, Michael N & Leslie C Green (eds) 'Violations of human rights in time of war as war crimes' (1995) 70 *International Law Studies*.
- Shaaban, Abdul Hussein 'Huquq al-insan silah amriki' *Libya-al-Mostakba* 14 April 2013, available at <http://www.libya-al-mostakbal.org/news/clicked/33165>, accessed on 2 April 2014.
- Sterbenz, Christina 'Why Norway's prison system is so successful' *Business Insider* 11 December 2014, available at <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12>, accessed on 12 January 2016.
- Tun Abdul Hamid, Mohamad 'Implementation of hudud in Brunei: Differences between Brunei and Malaysia', *Islam and Civilisational Renewal website*, Vol 5, no 2 available at <http://www.iais.org.my/icr>, accessed on 20 November 2015.

‘U.S.-Saudi relations’ *The US Council on Foreign Relations (CFR)* 1 October 2015, available at <http://www.cfr.org/saudi-arabia/us-saudi-relations/p36524>, accessed on 16 April 2016.

Usmani, Muhammad Taqi ‘The Islamization of laws in Pakistan: The case of hudud ordinances’ (2006) 96 (2) *The Muslim World*, 287–304, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1478-1913.2006.00129.x/pdf>, accessed on 6 December 2015.

Vagnoni, Giselda& Khalid Abdel Aziz ‘Death row Christian woman flies out of Sudan, meets Pope’ *Reuters* 24 July 2014, available at <http://www.reuters.com/article/us-sudan-christian-convert-idUSKBN0FT0T020140725>, accessed on 10 December 2015.

Yahaya, Mohammad Zaini, Muhammad Adib Samsudin& Hayatullah Lalulddin An overview of the principles of jurisprudence vis-a-vis legal maxim’ (2014) 10 (2) *Asian Social Science* 157.

Interviews etc

Al-Jazeera ‘Shabab-Mojahed[in]-Somal’, available at <http://www.youtube.com/watch?v=w8lm2LNJ8uk>, accessed on 1 April 2014.

Al-Qaradawi, Yusuf ‘Al hudud fi al ghetab al feqhi al-muaser’ *Al-Jazeera TV, Sharia and Life Program* 1 April 2011 Host Osman Osman, Doha, Qatar, available at <http://www.aljazeera.net/programs/pages/1033246e-121f-4e87-927b-8116d8b9e544>, accessed on 20 June 2014.

Al-Zoheily, Wahba in an exclusive interview on *Islam Web*, interviewed by Mohammed Nafisa, 4 August 2002 available at <http://articles.islamweb.net/media/index.php?page=article&lang=A&id=20484>, accessed on 10 January 2014.

Mujahid, Mohammad interviewed by Hajar Diab published by *Al-Ahram al-Massai* in Cairo on 20 January 2011, available at <http://digital.ahram.org.eg/articles.aspx?Serial=416340&eid=1226>, accessed on 2 April 2014.

‘Sheikh al-Azhar Yakshef Khilaf al-Fuqaha fi tadbiq had al-ridda’ *TV channel CBC Extra*, Imam Tayeb program, 16 June 2016, available at <https://arabic.rt.com/news/828109> accessed on 10 August 2016.